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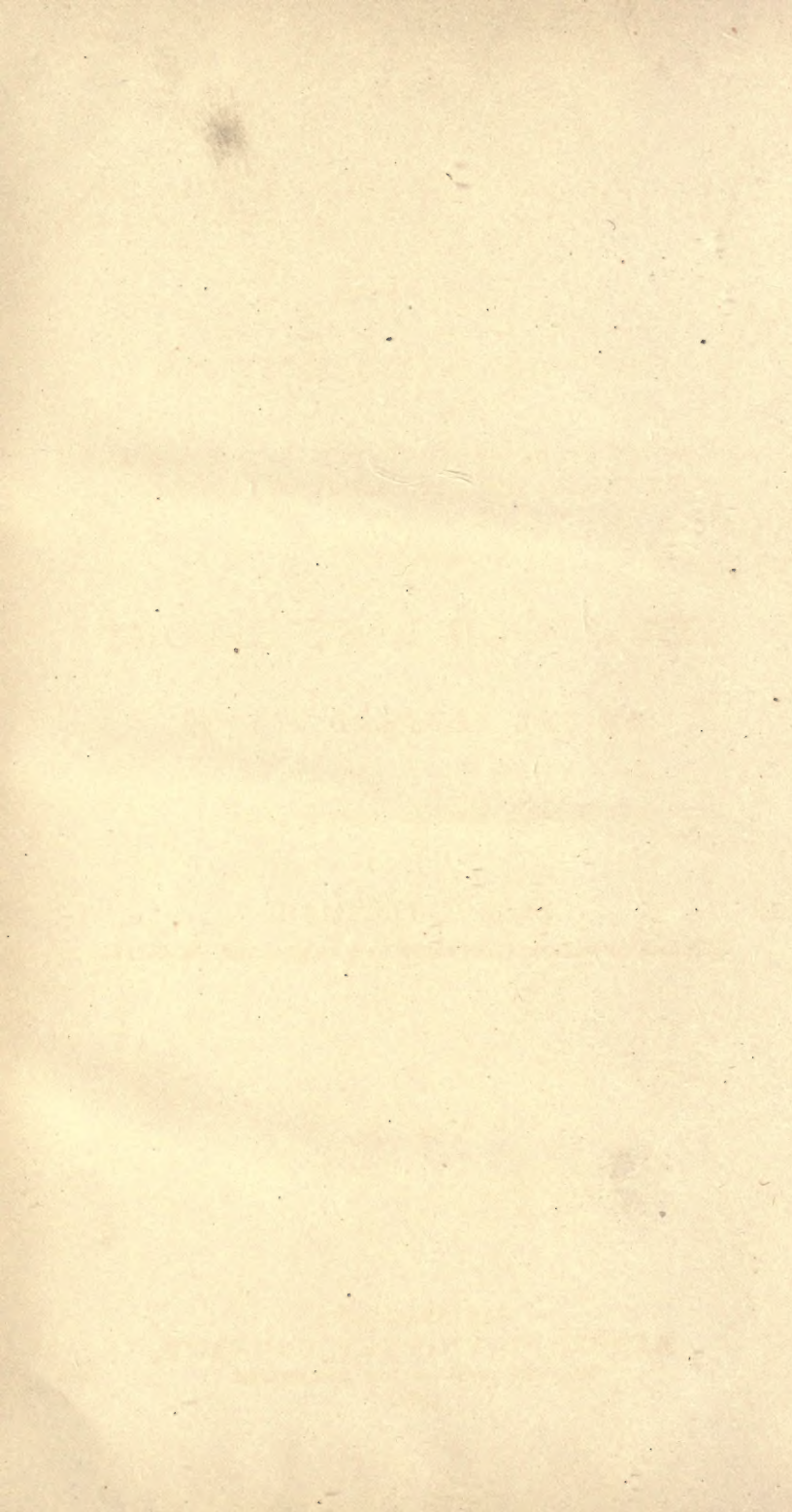


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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

SURSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. X.

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AMERICAN STATE REPORTS.

VOL. X

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AMERICAN STATE REPORTS.
VOL. X.



CASES
IN THE
SUPREME COURT
OF
INDIANA.

COOK v. WALLING.

[117 INDIANA, 2.]

MARRIED WOMEN.—POWER OF MARRIED WOMAN TO CONVEY OR ENCUMBER HER SEPARATE REAL ESTATE is wholly statutory, and any deed or other instrument purporting to convey or encumber her land in which her husband has not joined is absolutely void, because of the want of power or capacity on her part to execute such an instrument without being joined therein by her husband.

ESTOPPEL IN PAIS IS FOUNDED ON THE PROPOSITION that a person *sui juris* has, by misrepresenting the truth, purposely induced another to believe in and act upon the existence of certain facts, which, if they were now made to appear different from what they were represented to be, would cause substantial injury to the person who acted on the faith of the representation.

WHEN MARRIED WOMAN DEALS, OR ASSUMES TO DEAL, in respect to a matter concerning which her common-law disabilities have been removed, she will be bound by an estoppel *in pais* as any other person. But where the contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked to remove the incapacity.

INDIANA STATUTE OF 1881 AFFECTING MARRIED WOMEN with estoppels *in pais* is inapplicable to prior contracts.

MARRIED WOMAN WHO, UPON ASSUMPTION THAT HER HUSBAND IS DEAD, because absent and not heard from for more than seven years, marries another man, and while cohabiting with him in the honest belief that he is her husband, joins with him in mortgaging her separate real estate, may, upon the return of her lawful husband and the resumption of marital relations with him, avoid the mortgage by a plea that he did not join in its execution as the law requires. In such case the doctrine of estoppel has no application.

J. V. Kelso, for the appellant.

A. Dowling and J. H. Stotsenburg, for the appellee.

MITCHELL, J. The question for decision arises upon the following facts, which are admitted by the pleadings: In December, 1855, the appellee, Mary C. Walling, became the lawful wife of Creed A. Walling, who, after living with her until some time in the year 1860, went to parts unknown, and was not again heard of until the year 1876, a period of some sixteen years. After Walling had been thus absent for more than seven years, acting under the supposition that he was dead, the appellee married Alexander E. Hughes, and removed from a foreign state with him, where they had theretofore resided, to Floyd County, Indiana. She purchased a tract of land in the above-named county, which was conveyed to her by the name of Mary C. Hughes. In 1875, the appellee, by the name of Mary C. Hughes, joined with her supposed husband, Alexander E. Hughes, in mortgaging the real estate so purchased and owned by her, to secure a debt due from Hughes to the appellant, Kate C. Cook. The appellee lived and cohabited with Hughes, and claimed him as her husband, and claimed and was reputed to be his lawful wife, during all the time they lived in Indiana, until the year 1876, when Walling returned and made the fact known that he was still in life, whereupon the appellee obtained a divorce from Hughes, and resumed and has ever since continued marital relations with Walling.

The question is, whether or not in a suit to foreclose the mortgage given as above, the facts hereinbefore recited are sufficient to avoid a special plea by Mary C. Walling, in which she alleged that the lands described in the mortgage were her separate estate, and that at the time of the execution of the mortgage, she was and ever since had been the wife of Creed A. Walling, and that he did not join in the execution of the mortgage.

A statute touching the marriage relation, in force at the time the mortgage was executed, as well as that now in force, declares that a married woman shall have no power to encumber or convey her real estate, except by deed in which her husband shall join: 1 R. S. 1876, 550; Id. 1881, sec. 5117.

It being conceded by the record that the appellee was, at the time she executed the mortgage, the lawful wife of Creed A. Walling, and that he did not join therein, it follows inevi-

tably that the mortgage was a nullity. The power of a married woman to convey or encumber her separate real estate is wholly statutory, and any deed or other instrument purporting to convey or encumber her land in which her husband has not joined is absolutely void because of the want of power or capacity on her part to execute such an instrument without being joined therein by her husband. As has been said: "The instrument has the form and semblance of a deed, and nothing more": *Lowell v. Daniels*, 2 Gray, 161; 61 Am. Dec. 448. It is without legal force, and of itself creates no equity which the courts can recognize or protect: *Otis v. Gregory*, 111 Ind. 504, and cases cited.

Tacitly conceding the invalidity of the instrument, it is nevertheless contended with much plausibility that, because the appellee was living and cohabiting with Hughes, and because the latter, assuming to be her husband, joined in the execution of the mortgage, she ought now to be estopped from asserting that her husband did not join therein.

An estoppel *in pais* has for its foundation the proposition that a person *sui juris* has, by misrepresenting the truth, purposely induced another to believe in and act upon the existence of certain facts, which, if they were now made to appear different from what they were represented to be, would cause substantial injury to the person who acted on the faith of the representation. When, therefore, a married woman deals, or assumes to deal, in respect to a matter concerning which her common-law disabilities have been removed, she will be bound by an estoppel *in pais*, as any other person, and in case she makes affirmative representations concerning the character in which she proposes to contract,—whether for the benefit of herself or of some third person,—and thereby induces another, who acts in good faith, to contract with her, supposing the contract to be of the character represented, she will be estopped to deny the representations, in case she would have been *sui juris*, in respect to the contract, had the facts been as represented: *Orr v. White*, 106 Ind. 341; *Rogers v. Union Cent. L. Ins. Co.*, 111 Id. 343; 60 Am. Rep. 701; *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621; *Bodine v. Killeen* 53 N. Y. 93.

Where, however, the contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked in order to re-

move the incapacity. In other words, while a married woman may be estopped by affirmative representations concerning the character of a contract, which, if her representations be true, she is, notwithstanding her coverture, under no legal disability to make, she cannot by her own act or representation remove her legal incapacity to make a contract which coverture alone, under any and all circumstances, disqualifies her from making except in a prescribed way: *Carpenter v. Carpenter*, 45 Ind. 142; *Levering v. Shockey*, 100 Id. 558; *Bank of America v. Banks*, 101 U. S. 240; *Sims v. Everhardt*, 102 Id. 300; *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524; *Klein v. Caldwell*, 91 Pa. St. 140; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Todd v. Pittsburgh etc. R. R. Co.*, 19 Ohio St. 514.

The statute, as well as the common law, deprives a married woman of all power to convey or encumber her separate real estate except by deed in which her husband shall join. Without the joinder of the person who occupies toward her the legal relation of husband, the impediment in the way of a deed by a married woman is an absolute incapacity to contract, and this legal incapacity is not cured nor removed because some person other than her husband has joined in the deed, even though she may be at the time cohabiting with such person in the honest belief that he is her husband.

It would present a contradiction in terms to hold that an abortive attempt by a married woman to make a deed which she had no legal capacity to make should remove her incapacity by the application of the doctrine of estoppel: *Behler v. Weyburn*, 59 Ind. 143.

Desertion or continued and unheard of absence may constitute a ground of divorce; and in case a husband shall have absented himself from his usual place of residence, and gone to parts unknown, for a given period, the court having probate jurisdiction may appoint an administrator, after which appointment the wife of the departed person shall have all the rights and independent powers of a *feme sole*, and may contract and execute deeds for herself: R. S. 1881, secs. 2232, 2234. But a married woman who has been deserted cannot lawfully contract a second marriage, during the lifetime of her husband, without obtaining a divorce; nor can she alien or encumber her real estate in his absence, except by pursuing the course indicated by the statute: *Rhea v. Rhenner*, 1 Pet.

105; *Beckman v. Stanley*, 8 Nev. 257; *Harrison v. Brown*, 16 Cal. 287

The appellee's second marriage was a nullity, because her husband was alive at the time; and for the same reason, her deed was void, although joined in by a person supposed to be her husband, but who, in fact, was not.

Whether or not the conclusions above stated would be in any way modified had the mortgage in suit been executed since the statute of 1881, touching estoppels *in pais*, affecting married women, came in force, we need not now inquire. It is enough to say the statute referred to has no application to the contract in question.

The judgment is affirmed, with costs.

MARRIED WOMEN — PROPERTY RIGHTS. — CONNECTICUT STATUTES OF 1877 PROVIDE THAT ALL PROPERTY OWNED by the wife when she marries shall remain her sole and separate estate. Prior to the adoption of such statute, the wife had in equity all the rights of a *feme sole* in respect to such estate, including the right to make any contracts in relation thereto with her husband, and though the statute provides that she may contract with others, it is silent as to her capacity to contract with her husband; but such silence cannot be construed as implying an impairment of her prior rights; so that a woman married since the adoption of such act retains the right in equity to make contracts with her husband as well as others in regard to her sole and separate estate: *Spitz's Appeal*, 56 Conn. 184; 7 Am. St. Rep. 303. Married women and married men are placed on the same footing by the statutes of Illinois with respect to their property rights: *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526. Property rights of married women, as affected by American statutes: See note to *Kirkpatrick v. Buford*, 79 Am. Dec. 366-401. At common law, married women could not make valid contracts: *Dobbins v. Hubbard*, 17 Ark. 189; 65 Am. Dec. 425; but under most of the state statutes married women have been extended more or less powers to contract and be contracted with: See note to *Kantrowitz v. Prather*, 99 Id. 599-610. Where, at the time of the execution of a deed, the disability of a married woman is general, and she cannot bind herself unless expressly authorized by statute, the statute must be strictly followed: *Williams v. Cudd*, 26 S. C. 213; 4 Am. St. Rep. 714, and note.

MARRIED WOMEN CANNOT CONVEY OR ENCUMBER THEIR REALTY or bind themselves by any contracts, except under strict compliance with the statutes giving her such power: *Williams v. Cudd*, 26 S. C. 213; *Aultman and Taylor Co. v. Rush*, 26 Id. 517.

THE APPLICATION OF THE LAW OF ESTOPPEL to the acts and deeds of married women is the subject of notes to *Shivers v. Simmons*, 28 Am. Rep. 374-377; *Cravens v. Booth*, 58 Am. Dec. 114-117; *Reis v. Lawrence*, 49 Am. Rep. 87-92.

ESTOPPEL — ESSENTIAL ELEMENTS OF ESTOPPEL: See *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, and note 53. The doctrine of estoppel applies to married women as to all acts performed by them since the adoption of the South Carolina constitution of 1868: *Crenshaw v. Julian*, 26 S. C. 283;

4 Am. St. Rep. 719, and note 724. Married women are estopped from denying their positive representations made to a mortgagee, who, acting in good faith, and having no knowledge of the untruth of such representations, is induced thereby to take mortgages upon their realty: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621, and note 626. An instruction purporting to state the law upon the subject of estoppel *in pais* is erroneous, if it omits the element that the party against whom the estoppel is invoked made the declaration or did the act upon which the estoppel is sought to be based, either with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud: *Griffeth v. Brown*, 76 Cal. 260.

ESTOPPEL BY SILENCE OR FAILURE TO ASSERT ONE'S RIGHTS. — Silent acquiescence, misleading a party to his disadvantage, works an equitable estoppel: *Nicholas v. Austin*, 82 Va. 817. When one who is negotiating a purchase with the holder of an absolute deed for land informs the maker of the deed, who is in possession, of his intention to purchase, and the latter asserts no interest or equity in it, he is estopped by his silence from setting up that the deed was intended merely as a mortgage, after the purchase has been consummated: *Gill v. Hardin*, 48 Ark. 409. If the owner of real estate permits such realty to be sold in his presence by one who claims he has full power and authority to dispose of it, and does not then assert his claim, but stands by and permits an innocent purchaser to buy such land, he is estopped by his silence from thereafter claiming such land of such *bona fide* purchaser on the ground of a want of authority in the person who sold the land: *Stone v. Tyree*, 30 W. Va. 687. One who knowingly permits another to purchase land and expend money thereon under the supposition that he is the owner, and without making known his own claim, will be estopped by reason of his silence from afterwards exercising his legal rights against the purchaser: *Forbes v. McCoy*, 24 Neb. 702. Where two coterminous owners trace their division line without any agreement more than is implied from their acts, and both recognizing it as such, one goes to work, and with the knowledge and acquiescence of the other makes such valuable improvements as to work a great injury to him making them, if the division line be disturbed, the other will be estopped by his silence from afterwards alleging such mistake in the division line as will deprive the first one of his improvements: *Helm v. Wilson*, 76 Cal. 477. But the silence of one of the plaintiffs in the presence of a conversation between one of the defendants and a third person in regard to the contract in question did not work an estoppel, where at the time he did not know the terms of the contract, and was under no obligation to speak: *George, Weeks, & Co. v. Swafford*, 75 Iowa, 491. Where the state of ownership of insured property is made known to the agent of the insurance company at the time the policy was issued, the insurance company cannot set up the want of complete ownership to bar an action on the policy: *Crescent Ins. Co. v. Camp*, 71 Tex. 503. But where the foundation for an estoppel insisted upon is the silence or omission to give notice of one's rights, the party relying thereon must not have had the means of knowing the true state of facts by reference to the public records: *Thor v. Oleson*, 125 Ill. 365. Nor will one be estopped when she brings her action in ejectment within the time prescribed by statute, because during that time she lived in the neighborhood, and knew, or might have known, of defendant's occupancy of the land and his improvements thereon: *Bartlett v. Kander*, 97 Mo. 356.

ESTOPPEL BY ACTS AND CONDUCT. — Where complainant held the lease of a store from G., and occupied it as a country store, and such lease gave

him the option of buying the premises at any time during his term, at whatever price might be offered G. for the same, and where G. offered to sell to E., and entered into a contract in writing therefor, of which complainant was ignorant until after the contract was executed, and E. had no knowledge of complainant's rights till notified thereof by complainant himself, and where, on the sixth day of January, E. bought and paid for complainant's stock of merchandise in the storehouse, and on March 25th of the same year complainant surrendered possession to E., but failed to state that he intended to insist on a conveyance of the realty to himself under the provisions of his lease, complainant was estopped by his acts and conduct as well as by his failure to assert his rights from interfering with the transfer of title from G. to E.: *Race v. Groves*, 43 N. J. Eq. 284.

SONDHEIM v. GILBERT.

[117 INDIANA, 71.]

CONTRACT FOR SALE AND FUTURE DELIVERY OF COMMODITY WHICH SELLER DOES NOT OWN, and which has at the time no actual existence, but which may be procured in the market at the proper time, is a valid contract, if it is the intention of the parties, or one of them, that the commodity shall actually be procured by the seller and delivered to the purchaser; and this is so, although money may have been deposited, as a margin, to secure performance of the contract, or as indemnity against loss in case of failure of either party to perform.

IF DELIVERY OF SUBJECT-MATTER OF CONTRACT IS NOT CONTEMPLATED, and real intention of parties is merely to speculate on the rise or fall of the market, and adjust the accounts between them by paying or receiving the difference between the contract and current price, then the whole transaction is illegal, as against public policy.

NEGOTIABLE PROMISSORY NOTE RESULTING FROM OR GROWING OUT OF WAGERING or gambling transaction is invalid as between the parties, on general common-law principles, but is valid in the hands of a third person who takes it in due course of trade, before maturity, for value, and without notice of the purpose for which it was executed or drawn, unless declared to be void by the peremptory words of a statute.

CONTRACT VALID BY LAW OF STATE WHERE MADE AND TO BE PERFORMED is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced.

STATUTES INVOLVING PENAL CONSEQUENCES CANNOT BE EXTENDED by construction so as to include acts not in terms forbidden merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious.

PAYMENT OF NEGOTIABLE PAPER ISSUED IN NEW YORK IN COURSE OF SPECULATION in cotton options in that state will be enforced in Indiana in the hands of an innocent holder, the statutes of neither state declaring such paper void in the hands of such a holder.

WHEN PARTNERSHIP IS ENGAGED IN COURSE OF BUSINESS IN WHICH USE OF COMMERCIAL PAPER IS APPROPRIATE, the firm is liable upon such

paper, in the hands of a *bona fide* holder, when issued in the firm name by one of its members, although it may have been issued in violation of his duty, without the knowledge or consent of the other members.

D. B. Kumler, G. F. Denby, and J. Ullman, for the appellants.

A. Gilchrist, C. A. De Bruler, A. C. Harris, W. H. Calkins, and W. C. Wilson, for the appellee.

MITCHELL, J. This was a suit by Samuel and Henry P. Sondheim, partners doing business under the firm name of Sondheim Brothers, against John Gilbert, assignee of Miller Brothers, insolvents, to establish a claim against the partnership estate of the latter in the hands of the assignee.

It is averred in the complaint that Conrad and Jacob Miller had theretofore been partners doing a general mercantile business in the city of Evansville, under the firm name of Miller Brothers, and that on the eleventh day of December, 1885, they executed their promissory note, payable to themselves, in six months after date, in the city of New York, for \$7,264.11. It is averred that Miller Brothers afterwards negotiated the note by indorsement in blank, and that after it passed through the hands of divers persons, the plaintiffs became the owners of the note before its maturity, having paid therefor the full face value, without any notice whatever of the consideration for which it was given. The law of the state of New York, the note having been executed and made payable in that state, is set out in the complaint, and it appears therefrom that notes drawn in the form of that sued on are negotiable according to the custom and law of merchants.

The case was disposed of in the court below by a ruling on a separate demurrer to certain answers, which set up substantially the following facts, viz.: That at the date of the execution of the note, the Miller Brothers were engaged in the dry-goods business in the city of Evansville, and that Conrad Miller, one of the members of the firm, made an agreement with Morris Ranger, without the knowledge or consent of Jacob Miller, the other member of the firm, that they, Ranger and Conrad Miller, should engage on joint account in speculating in cotton futures upon the New York cotton exchange; that they agreed to buy, on joint account, fifty thousand bales of cotton to be nominally delivered during some months in the future; and that it was understood and agreed between them no cotton was to be actually bought, sold, re-

ceived, or delivered, but that, after making pretended purchases, if the price should advance or decline on the New York cotton exchange, there was to be a settlement of the differences accordingly, as the current price might be higher or lower than that nominally agreed upon at the time of the pretended purchase.

It is averred that, in pursuance of the foregoing arrangement, Conrad Miller executed the note sued on, together with a large number of other notes, without the knowledge or consent of his partner, and that the notes so executed were indorsed in blank by Conrad Miller, in the name of Miller Brothers, and placed in the hands of Ranger, to be used by him solely for the purpose of paying or securing losses or margins which were required to be put up in the contemplated transactions, which it is alleged were to be merely gambling or wagering speculations in cotton futures, and that the note sued on was made and indorsed for no other consideration whatever.

In some of the paragraphs of answer, which set up substantially the foregoing facts, certain sections of a statute against gaming, and affecting certain contracts and securities, alleged to be in force in the state of New York, are set out.

The court overruled the demurrer to the answers, and, the plaintiffs declining to reply, judgment was rendered disallowing the claim. The plaintiffs prosecute this appeal, and assign for error the ruling of the court in overruling the demurrer to the defendant's answers.

Upon a determination of the propriety of this ruling, the judgment of the court below must either be affirmed or reversed.

Whether or not contracts, notes, bills, and other securities growing out of transactions similar to those contemplated by Ranger and Miller, as disclosed by the facts admitted by the demurrer to the answers, are valid and collectible, has been the subject of much consideration in the courts. As related to legitimate commercial transactions and the recognized methods of conducting the mercantile business of the day, the importance of the question cannot readily be overestimated.

Formerly the rule was, that articles which had no actual or potential existence at the time of the contract were not the subjects of sale, but this was found to be such an impediment to commerce that some relaxation in the rule was deemed

necessary. It is now established, upon indisputable authority, that a contract for the sale and future delivery of a commodity of a designated kind or class which the seller does not own, and which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller, and supplied to the purchaser at or before the maturity of the agreement: *Cobb v. Prell*, 22 Am. Law Reg., N. S., 609, and note; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and note.

In such a case, it does not invalidate the transaction that the parties, or either of them, may have deposited money, as a margin, to secure the performance of the contract, or as indemnity against loss in case one or the other fails to consummate his agreement. As has been said, "present ownership is of less consequence than the intention of the contracting parties": *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520; *Whitesides v. Hunt*, 97 Ind. 191; 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337; 33 Am. Rep. 390.

While contracts for the sale of property to be delivered in the future are valid where the parties, or either one of them, actually contemplate a delivery of the subject-matter of the contract, yet if, under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law: *Whitesides v. Hunt*, *supra*, and cases cited; *Irwin v. Williar*, 110 U. S. 499.

The facts stated in the answer make it clear that the transactions contemplated by Morris Ranger and Conrad Miller were not the actual purchase and acceptance of cotton, but mere speculative wagers upon the price of that commodity, from time to time, as it might be quoted on the New York cotton exchange. This was an agreement to engage in mere wild speculation in the nature of gambling or wagering upon the fluctuations in the price of cotton. Such transactions

demoralize and embarrass legitimate trade, and are subversive of all correct business principles, destructive of commercial integrity and morality, and result directly or indirectly in most of the bankruptcies, defalcations, and forgeries which startle and distract business circles. Between the parties to such a transaction and all others who participate in the specific illegal design with the intention of aiding in its execution so as to become principals or accessaries thereto, any contract or other security resulting therefrom will be wholly invalid. But in the absence of a statute in direct terms prohibiting transactions of the character of that in question, and declaring them unlawful, or expressly declaring promissory notes growing out of such a transaction invalid, while the courts will, on general common-law principles, declare such notes invalid between the parties and those who were accessory to the illegal act, yet in order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise as that the former became *particeps criminis*: *Tyler v. Carlisle*, 79 Me. 210; *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190.

Thus it was held in *Bickel v. Sheets*, 24 Ind. 1, that a contract for the sale of property which the purchaser intended to use for gaming purposes, in violation of a statute, was not void, although the seller was informed at the time of the sale of the purpose for which the property was to be applied: *Cummings v. Henry*, 10 Ind. 109; *In re Lister*, 25 Eng. Rep. (Moak) 647, and note; *Feineman v. Sachs*, 33 Kan. 621; *Distilling Co. v. Nutt*, 34 Id. 724; *Fisher v. Lord*, 63 N. H. 514; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. There must be knowledge of and participation in the illegal or immoral purpose.

It is not necessary, however, that we pursue this feature of the case further, as it is conceded upon the record that the note in suit came to the hands of the plaintiffs in the due

course of trade, before maturity, for value, and without notice of the purpose for which it was executed or drawn. In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which, in direct terms, declares that transactions such as those here involved are unlawful, and that notes given under the circumstances exhibited by the facts in this case are absolutely void.

The principle may be considered as well established, that when a statute in express terms pronounces contracts, notes, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority: *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40; *Thompson v. Bowie*, 4 Wall. 463; *Vallett v. Parker*, 6 Wend. 615; 1 Daniel on Negotiable Instruments, secs. 197, 807. In such a case, the note will be declared void in the hands of an innocent holder, in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under consideration: *Town of Eagle v. Kohn*, 84 Ill. 292.

The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void. But unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable: *Hatch v. Burroughs*, 1 Wood, 439; *Town of Eagle v. Kohn*, *supra*; *Third National Bank v. Tinsley*, 11 Mo. App. 498; *Third National Bank v. Harrison*, 3 McCrary, 316; 10 Fed. Rep. 243; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Day v. Stuart*, 6 Bing. 109; Chitty on Bills, *92; 2 Randolph on Commercial Paper, sec. 511.

It is argued, however, in support of the ruling below, that because the note sued on was negotiated in consideration of money advanced with which to prosecute a wagering or gam-

bling speculation, it is, nevertheless, void in the hands of an innocent holder within the provisions of section 4950 of the Revised Statutes of 1881, which declares, in effect, that all notes, bills, etc., when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying money lent, at the time of such wager, for the purpose of being wagered, shall be void.

The note in suit having been executed and made payable in the state of New York, and it appearing that the alleged illegal transactions contemplated by the parties concerned in issuing and putting the note in circulation were to be engaged in and consummated in the state of New York, the law of that state must be looked to primarily in determining the validity of the contract; the rule in that respect being that a contract valid by the law of the state in which it is made and is to be performed is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced: *Tilden v. Blair*, 21 Wall. 241; *Wayne County Savings Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Hawley v. Bibb*, 69 Ala. 52; *Stix v. Matthews*, 75 Mo. 96; *Swann v. Swann*, 21 Fed. Rep. 299; *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169; *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Miliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205.

A contract, although valid where made, will not be carried into effect if by the laws of the state whose jurisdiction is invoked the contract which is sought to be enforced is stigmatized as unlawful, and so prohibited.

Relying upon the invalidity of the note by force of the *lex loci contractus*, the appellee has, as we have seen, pleaded the statute of the state of New York relating to gaming contracts in one of the paragraphs of his answer. In the other paragraph he relies upon the statute of our own state to invalidate the note. By section 8 of the New York statute, all wagers, bets, or stakes made to depend upon any lot, chance, casualty, or unknown or contingent event, are declared to be unlawful, and all contracts for or on account of any money, property, or thing in action so wagered, bet, or staked are declared void. The other section declares, in effect, that all securities any part of the consideration of which is money won by playing

at any game, or by betting on the hands of such as do play at any game, or to repay any money knowingly lent at the time and place of any such play to any person so playing, shall be utterly void. This last section can have no possible application to a transaction such as that disclosed by the facts in the present case. It would be an unwarranted perversion of common and correct speech to hold that the consideration of a note which had been executed in order to obtain money with which to purchase options, or to put up as margins in cotton speculations, was money won by playing at a game, or by betting on the hands of others who do play, or to repay money lent at the time and place of such play. However much dealing in options may resemble gambling or betting, and demoralizing and pernicious as it may be, it cannot, with any degree of propriety, be said to be winning or losing money by playing at or betting upon any game, within the meaning of the statute: *White v. Barber*, 123 U. S. 392.

Statutes involving penal consequences cannot be extended by construction so as to include acts not in terms forbidden merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious: *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474.

The purpose of the legislature in enacting the statute was to avoid securities any part of the consideration of which was money won by playing at any game, etc. The words of a statute are not to be enlarged by intendment so as to extend beyond the mischief contemplated, where such a construction would be injurious to innocent third persons. A statute ought not to be enlarged by mere construction so as to permit the very persons guilty of the offense prohibited to retain money obtained contrary to the statute from third persons guilty of no violation of law whatever: *Edwards v. Dick*, *supra*.

The statutes against gaming which render all wagers, bets, and stakes unlawful, and avoid all contracts for or on account of any money wagered or bet, or any notes or other securities, when the whole or any part of the consideration thereof shall be for money won or lost on any game or wager, and statutes which make it a criminal offense to bet upon any game or the like, although not applicable in terms to the purchase of options, are sufficiently indicative of the policy of the law as respects mere wagering contracts, of whatever description or name, to require the courts to pronounce all such contracts and securities invalid in the hands of those who were implicated in

violating public policy by specifically aiding or directly participating in the furtherance of such transactions. They do not, however, go to the extent of destroying commercial securities in the hands of innocent holders for value, even though such securities may have had their inception in a transaction thus condemned.

In respect to section 8, above referred to, it may be said the distinction between contracts for or on account of any money, etc., wagered, bet, or staked upon any game, and securities, bills, notes, etc., any part of the consideration of which shall be money won or lost by playing at any game, etc., is obvious.

The contracts mentioned are the agreements of the parties, by which they undertake beforehand to bind themselves to pay or deliver to the winner the money, property, or thing wagered, bet, or staked on the game or contingent event. These are declared unlawful and void, and so they are, in whosoever hands they may be found. The things in action, notes, bills, securities, etc., referred to in the other section, are the evidences of indebtedness given for money won or lost by playing at any game, or by betting on the hands of those who play, after the event, or for money knowingly lent at the time and place of such play to a person so playing, and these are declared to be utterly void, and so they are, without regard to their form, or the fact that they may be in the hands of an innocent holder: *City of Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413; 1 Daniel on Negotiable Instruments, sec. 807; Chitty on Bills, 92; *New v. Walker*, *supra*; *Greenland v. Dyer*, 2 Man. & R. 422; 2 Randolph on Commercial Paper, sec. 511.

The note sued on does not fall within the terms of either section of the New York statute. The paper was made by and was payable to Miller Brothers. It was indorsed by them, or in their name, and delivered to Ranger, who advanced no consideration for it, but negotiated it to persons who took it for full value in the regular course of business, without notice. Until the paper was negotiated for a consideration it had no legal inception as a promissory note. In the hands of the parties to the illegal transactions contemplated, it was not a note given upon an illegal consideration, but it was a paper without any consideration, signed merely for purposes of accommodation. After it was negotiated it became a promissory note the consideration of which was money advanced by persons who had no notice of the illegal purpose for which the

parties contemplated using it, and who were in no way or sense parties implicated in the illegal confederacy.

Having reached the conclusion that the statutes of the state of New York do not, in terms, render void mercantile notes executed in consideration of money which the parties receiving the money intended to embark in gambling speculations on the stock market, it only remains that we say that the statutes of our own state already referred to indicate such a coincidence in the policy of both states as that the courts of this state will not hesitate to enforce the liability of a maker of a note such as that involved in the present case in the hands of an innocent holder.

It is not necessary that we should remark further upon the effect of the Indiana statute as applied to notes growing out of transactions such as that under consideration when such notes are executed and payable in this state.

It is enough to say that we are not disposed to indulge in a forced and strained construction of the language of our own statute in order to reach the conclusion that to enforce payment of a commercial note in the hands of an innocent holder which is not within the inhibition of the statute of the state where the note was executed and made payable would be either opposed to public morals or violative of the policy or law of this state.

It appears from the complaint that the note came to the hands of the plaintiffs in the usual course of business, for value, without notice of any defect in the consideration. The contention that the firm of Miller Brothers is not bound because the paper was issued by one of the partners without the consent of the other, in a matter outside the scope of the partnership business, is, therefore, unavailing.

It is quite true that paper issued in fraud of the rights of the firm, by a member of a commercial partnership, upon a consideration outside of the scope of the firm business, while it remains in the hands of one affected with notice, or in whose hands it is subject to like defenses as in the hands of the payee, is not enforceable against the partnership: *Irwin v. Williar, supra*; *Graves v. Kellenberger*, 51 Ind. 66.

When, however, a partnership is engaged in a course of business in which the use of commercial paper is appropriate, the firm is liable upon such paper, in the hands of a *bona fide* holder, issued in the firm name by one of its members, notwithstanding it may have been issued in violation of his

duty by one of the firm without the knowledge or consent of the other members: *First National Bank etc. v. Morgan*, 73 N. Y. 593; *Smith v. Collins*, 115 Mass. 388; Lindley on Partnership, 131.

These conclusions lead to a reversal of the judgment. The judgment is accordingly reversed, with costs.

CONTRACTS. — THE VALIDITY OF CONTRACTS IS GOVERNED BY *LEX LOCI CONTRACTUS*, but, in absence of evidence, this law will be presumed to be the same as *lex fori*: *Brown v. Browning*, 15 R. I. 422; 2 Am. St. Rep. 908, and note 910; *Cromwell v. Royal C. Ins. Co.*, 49 Md. 366; 33 Am. Rep. 258; *Gay v. Rainey*, 89 Ill. 221; 31 Am. Rep. 76.

CONTRACTS TO DEAL IN FUTURES OR MARGINS, THEIR VALIDITY, and the enforcement of relations growing out of: Note to *Clarke v. Brown*, 4 Am. St. Rep. 101. Contracts for sale of personalty to be delivered in the future, when valid: Note to *McGrew v. City P. Exchange*, 4 Am. St. Rep. 776. Contracts for speculating upon the rise and fall of commodities are within the letter and spirit of the Tennessee code, section 2440, which provides that "any person who has paid money or delivered anything of value lost upon any game or wager may recover such money, thing, or its value." But contracts for the purchase or sale of commodities for future delivery are void, as wagering contracts, irrespective of the Tennessee code, when the intention of both parties is that there should be no real purchase or delivery, but only to speculate on the rise and fall of prices: *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771. Where at a meeting it was agreed, in the preparations for a squirrel-hunt, that the beaten party should pay for the supper of the victors, and the captains of each party (defendants) engaged plaintiff to furnish the supper, and plaintiff presided at the meeting, and understood and knew how the suppers were to be paid for, the plaintiff was entitled to recover of defendants for the suppers of the whole party: *Winchester v. Nutter*, 52 N. H. 507; 13 Am. Rep. 93. A wager as to whether an execution can be collected or not is not "gaming, nor a wager upon a game," but is a void contract, as against public policy, as between the original parties, but valid as to a *bona fide* transferee of a check given therefor: *Boughner v. Meyer*, 5 Col. 71; 40 Am. Rep. 139. A check given to an agricultural society to enable the drawer to enter his horse in a competition in "a trial of speed" for a premium offered by the society is void, under Pennsylvania statute against wagers, etc.: *Comley v. Hillegass*, 94 Pa. St. 132; 39 Am. Rep. 774. Where a statute provided that all promises, notes, bills, contracts, etc., made upon any gambling consideration should be void; that a court of equity might set aside any such promise, note, etc.; and that no assignment of any bill, note, agreement, or other security, as aforesaid, should, in any manner, affect the remedies of any person interested therein; and where the plaintiff indorsed certain drafts payable to his order, and staked them on a faro game and lost; and where such drafts were subsequently transferred, in the usual course of business, and without notice, and for a valuable consideration, to the defendant, — in a suit to cancel the indorsements, and to have the drafts delivered to plaintiff, the court held the indorsements void, and that defendant had acquired no title to the drafts: *Chapin v. Dake*, 57 Ill. 295; 11 Am. Rep. 15. The consideration for a debt contracted at gaming is illegal between the parties, and as to all other per-

sons except *bona fide* holders without notice: *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746. An immediate purchase of goods lost at play by the loser, or by a third party for him, would be a palpable evasion of the statute; and a note given by such purchaser would be a note given for money lost at play: *Hockaday v. Willis*, 1 Spear, 379; 40 Am. Dec. 606. One who sells a horse to another, and takes a note of a third person therefor, can recover on the note, although the maker executed it in consideration of a gambling debt due the vendee, of which fact the vendor had notice: *Jones v. Sevier*, 1 Litt. 50; 13 Am. Dec. 218. Bond given on a gaming consideration to convey land does not bind the obligor; but if the bond be assigned to a *bona fide* purchaser for value, and the obligor conveys to him, neither he nor his heirs or representatives can afterwards question the consideration, where the statute against gambling vitiates deeds only in the hands of the winner: *Chiles v. Coleman*, 2 A. K. Marsh. 296; 12 Am. Rep. 396. A note given for margins, on dealings in options, is not within the statute making void all notes given in betting or gaming: *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474. A note based on a wagering contract, assigned as collateral to a *bona fide* holder without notice, may be enforced to extent of the debts thereby secured: *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745. And as to general discussion of validity of contracts for the sale of personality to be delivered in the future, known as dealings in futures, see *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note 752-766; and see also *Tyler v. Carlisle*, 79 Me. 210; 1 Am. St. Rep. 301, and note 302, 303.

STATUTES.—PENAL STATUTES ARE TO BE STRICTLY CONSTRUED: *Warner v. Commonwealth*, 1 Pa. St. 154; 44 Am. Dec. 114; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658; *Galbraith v. McFarland*, 3 Cold. 267; 91 Am. Dec. 281; *Keller v. State*, 11 Md. 525; 69 Am. Dec. 226; *Lathrop v. Middleton*, 23 Cal. 257; 83 Am. Dec. 112; *Gates v. McDaniel*, 2 Stew. 211; 19 Am. Dec. 49; *Daggett v. State*, 4 Conn. 60; 10 Am. Dec. 100.

PARTNERSHIP.—WHERE ONE SUES A FIRM ON A NOTE EXECUTED TO HIM BY ONE OF THE PARTNERS for his individual debt, he cannot recover against the firm or the other partners, without affirmatively showing the signer's special authority, or a ratification by other partners: *Mechanics' & T. Ins. Co. v. Richardson*, 33 La. Ann. 363; 25 Am. Rep. 684; *Levi v. Latham*, 15 Neb. 509; 48 Am. Rep. 361; *Deardorf v. Thacher*, 78 Mo. 128; 47 Am. Rep. 95; *Friend v. Duryee*, 17 Fla. 111; 35 Am. Rep. 89. Where a partner executed his note, and indorsed the firm name upon it, and assigned it to a *bona fide* purchaser, the firm was not *prima facie* liable upon it: *Pooley v. Whitmore*, 10 Heisk. 629; 28 Am. Rep. 733; *Calkins v. Smith*, 48 N. Y. 614; 8 Am. Rep. 575. Where A, who was a member of a firm, M. & Co., and also of W. & Co., made his individual note to the order of W. & Co., and it was indorsed by W. & Co., and A then indorsed it with the firm name of M. & Co., and it was negotiated by W. & Co. into a broker's hands, who sold it to plaintiff (W. & Co. being in the vinegar business, and M. & Co. in a business not requiring vinegar), the circumstances were not sufficient to put plaintiff upon his inquiry, and he was a *bona fide* holder, and M. & Co. were liable to him upon the note: *Moorehead v. Gilmore*, 77 Pa. St. 118; 18 Am. Rep. 435; *Miller v. Consolidation Bank*, 48 Pa. St. 514; 88 Am. Dec. 475. A note of firm given for a private debt of one partner is good against the firm in the hands of a *bona fide* holder: *Haldeman v. Bank of Middletown*, 28 Pa. St. 440; 70 Am. Dec. 142. Drawing, accepting, or indorsing bills or notes by one partner in the name of the

firm, or in their behalf, renders all the firm liable to a *bona fide* holder, although the other partners were ignorant of the transaction: *Fleming v. Prescott*, 3 Rich. 307; 45 Am. Dec. 766; *Hawes v. Dunton*, 1 Bail. 146; 19 Am. Dec. 663.

CITY OF ANDERSON v. EAST.

[117 INDIANA, 126.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR FAILURE to exercise legislative or judicial powers, nor for a negligent exercise of such powers, but only where it negligently performs or fails to perform a ministerial duty imposed by law.

MUNICIPAL CORPORATION OWES DUTY to those who use its streets to exercise ordinary care to make them safe for passage.

MUNICIPAL CORPORATION IS NOT CHARGED WITH DUTY OF PROTECTING the private property of a citizen from injury from the walls of an adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous.

NEGLIGENCE. — OWNER OF BUILDING ON SIDE OF PUBLIC ALLEY IN CITY WHO NEGLIGENTLY PERMITS the walls thereof, weakened and made dangerous by fire, to remain unsupported is liable to the owner of a building on the opposite side of the alley for injury thereto caused by the ruined walls falling upon it, although the city marshal volunteered to take charge of the walls and the owner assented.

E. B. Goodykoontz, F. P. Foster, C. L. Henry, H. C. Ryan, and E. P. Schlater, for the appellants.

W. R. Pierse and C. B. Gerard, for the appellee.

ELLIOTT, C. J. The defendants severed in their defenses in the trial court, and here separately assign errors. Consequently there are two branches of the case, involving essentially different questions: one in which the rights of the city of Anderson are involved, and another which involves the rights of the appellant Doxey. It is proper, as well as convenient, to first consider and dispose of that branch of the case in which the rights of the municipal corporation are involved.

The judgment against the city of Anderson rests entirely upon the second paragraph of the complaint, and if that is bad, the judgment is entirely destitute of foundation. Our first step, therefore, is to ascertain and determine whether the second paragraph of the appellee's complaint states a cause of action against the city of Anderson.

That paragraph of the complaint contains these material facts: On the thirteenth day of November, 1884, the plaintiff

was the owner of a building in the city of Anderson. Sixteen feet distant from the plaintiff's building was a large brick structure with walls thirty feet in height. The building was owned by the appellant Charles T. Doxey. On the night of November 13, 1884, Doxey's building was burned, but the brick walls remained standing. Doxey's building stood on the line of a public alley sixteen feet in width. The cornice of the Doxey building projected over this alley. The cornice and wall of the burnt building fell upon the plaintiff's building and destroyed it. The city knew that the wall was dangerous, and likely to fall, and was notified of that fact, as was Doxey. Notwithstanding the notice and knowledge, the defendants negligently permitted the wall, weakened and made dangerous by the fire, to remain unsupported for nine days, when it fell, crushing the plaintiff's building.

Our judgment is, that no cause of action is stated against the city. A municipal corporation is an instrumentality of government, and is not liable for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers: *Wheeler v. City of Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837; *Dooley v. Town of Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *City of Terre Haute v. Hudnut*, 112 Ind. 542; *Faulkner v. City of Aurora*, 85 Ind. 130; 44 Am. Rep. 1; *City of Lafayette v. Timberlake*, 88 Ind. 330; *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681; *McArthur v. City of Saginaw*, 58 Mich. 357; 55 Am. Rep. 687; *Agnew v. City of Corunna*, 55 Mich. 428; 54 Am. Rep. 383; *Hines v. City of Charlotte*, Sup. Ct. Mich., 1888; *Kiley v. City of Kansas*, 87 Mo. 103; 56 Am. Rep. 443; *Hubbell v. City of Viroqua*, 67 Wis. 343; 58 Am. Rep. 866; *Robinson v. Greenville*, 42 Ohio St. 625; 51 Am. Rep. 857, and note.

The authorities we have collected, to which many more might easily be added, illustrate all phases and postures of the general subject; but in one thing all unite, and that is, in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method. The decision in *Kiley v. City of Kansas*, *supra*, is directly in point, and applies the rule we have stated to a case in principle precisely like the one before us.

A recovery can be had against a municipal corporation only where it negligently performs, or negligently fails to perform,

a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. There must, in every case, be a duty, since where there is no duty there can be no negligence. It is, indeed, impossible to conceive a case where negligence can exist independent of a duty. It was, therefore, incumbent upon the appellee to show a ministerial duty and its wrongful breach. This he has not done. A municipal corporation owes a duty to those who use its streets to exercise ordinary care to make them safe for passage. It is not without hesitation that some of the courts have assented to this rule, and there once was reason for doubt, for, as a municipal corporation is an instrumentality of government, it is difficult to perceive upon what principle it can be sued, while the sovereignty of which it forms a part enjoys complete immunity. But the question is now closed. Municipal corporations are liable for a negligent breach of a ministerial duty. They are, however, liable only to one to whom they owe that duty, and to him only when the duty concerns something over which that duty extends. In many of the cases we have cited it is held that municipal corporations owe a duty only to persons using their streets, and to them only owe a duty to keep the streets safe for ordinary travel. In order to create a liability, the breach of duty must be such, many of the cases say, as to make the streets insufficient or unsafe for ordinary travel. We can conceive of no principle, and we know of no authority, upon which it can be held that a municipal corporation is under a duty to protect the property of a citizen from injury from the walls of an adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous. Municipal corporations are not charged with the duty of protecting private property. There is certainly nothing in the statute which imposes such a duty upon them, and if not in the statute, it does not exist.

The entire current of authority concentrates upon the proposition, that unless the law expressly, or by clear implication, imposes a duty upon a municipal corporation, none can be imposed by construction. Wharton says: "A duty, however, not imposed specifically on a corporation cannot be constructively attached so as to make its neglect the subject of a suit": Wharton on Law of Negligence, sec. 257.

Three cases are cited by the appellee. The first, that of *City of Anderson v. O'Conner*, 98 Ind. 168, is not even remotely relevant. This is apparent, without more being said,

when it is affirmed that the complaint in that case was to recover damages for a breach of contract.

The second case cited, *Grove v. City of Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262, while it carries the principle on which it proceeds to the utmost verge, decides only that a person traveling on a public street may recover for an injury caused by the falling of an overhanging cornice. Conceding that the decision in that case is correct, it by no means justifies the conclusion that a municipal corporation is liable for the destruction of property by the fall of an adjoining building. The decision, as the opinion shows, is based solely on the proposition that municipal corporations "are bound to keep the streets, including the sidewalks, in a reasonably safe condition for ordinary travel."

The third case cited, *Lowery v. City of Delphi*, 55 Ind. 250, in so far as it has the remotest resemblance to this case, simply announces and enforces the same general proposition. If the plaintiff were here seeking to recover for injuries received while using a street, these decisions would be relevant; but as he seeks to recover for the destruction of a building standing on his own ground, they are totally irrelevant.

We proceed now to the branch of the case involving the rights of the appellant Doxey. His counsel assert that the first paragraph of the complaint is bad, because it does not charge him with negligence. We cannot concur with them. The facts stated very clearly show that he was guilty of culpable negligence, and that his negligence was the proximate cause of the appellee's injury. It is charged, much as in the second, that the wall was unsafe and dangerous, that Doxey knew this, and that it constituted a public nuisance. In addition to these allegations, it is also averred that the wall was unsafe and dangerous from the 14th until the 22d of November, 1884, and that the defendant Doxey refused to make it safe, or to permit the plaintiff to do so.

To the second paragraph, it is objected by Doxey's counsel that the general averments of negligence are insufficient. This position rests on an undue assumption, for there are specific averments. But if there were not, the objection is not well taken, for it is settled that general averments of negligence are sufficient as against a demurrer: *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638.

The second instruction asked by Doxey was properly refused, for the reason that there was no evidence to which it

was applicable. Mr. Doxey testified that "Mr. Coburn, the marshal of the city, came to me the next morning after the fire, and said they would take charge of, or appoint policemen to look after, the walls, and have them torn down if necessary. He says: 'You need not bother anything about them; you have lost enough.' I think those were the exact words."

This evidence, and it is the strongest adduced by Doxey, did not warrant an instruction that "Doxey is not liable if the marshal of the city of Anderson and his deputies took charge and control of the premises, preventing any person from going near the ruins until after the walls fell." Waiving all question as to the authority of the marshal to exclude the owner of the building, and waiving, also, all question as to the fault of the instruction in not asserting that control was actually taken without the owner's consent, it was properly refused, because the owner could not shift his responsibility onto the municipal corporation. If there had been any testimony showing that the owner was compulsorily excluded by legal authority, a very different question would have been presented; but all that here appears is, that the marshal informed Mr. Doxey that he would take charge of the walls, and that Mr. Doxey consented that he might do so. The most that can be said of the testimony of Mr. Doxey is, that it proves that he turned the matter over to the control of the marshal, for there was no legal process employed to secure control. At all events, it is quite clear that Doxey did not escape responsibility by acceding to the request of the marshal; for third persons injured by his negligence cannot be denied compensation because he delegated or conceded his duties and rights to a city officer.

The judgment against the city of Anderson is reversed, and that against the appellant Doxey is affirmed.

MUNICIPAL CORPORATIONS. — MUNICIPALITY IS ONLY BOUND TO KEEP ITS HIGHWAYS, STREETS, AND SIDEWALKS REASONABLY SAFE: *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note; *City of Atlanta v. Buchanan*, 76 Ga. 585; *Kinney v. City of Troy*, 108 N. Y. 567; *Fowler v. Town of Strawberry Hill*, 74 Iowa, 644. A city is not absolved from the duty to keep its streets in a safe condition because they become unsafe through the neglect of a contractor employed by it: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note 459.

MUNICIPAL CORPORATIONS ARE NOT LIABLE FOR LEGISLATIVE OR JUDICIAL ACTS, but only for negligence in the performance of ministerial acts: *Dooley v. Town of Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209, and note 212; *Wright v. City Council of Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256, and note 259.

NEGLIGENCE — DANGEROUS WALLS AND ADJACENT BUILDINGS. — Where defendant's building and one upon an adjoining lot, the side walls of which were very near each other, were destroyed by fire, leaving the walls partly standing, and six months afterwards, while plaintiff was removing the wall on the adjoining lot, defendant's wall fell and injured him, plaintiff could not maintain action for such injury against defendant, in absence of evidence that defendant's wall was dangerous, or would have fallen before the fire or removal of the other wall, or that defendant knew of the removal, or that it was contemplated: *Mahoney v. Libbey*, 123 Mass. 20; 25 Am. Rep. 6. The house-owner is liable where a foot-passenger on a city street sat for a moment on the door-sill of a house fronting the street, to tie his shoe, and there was injured by a brick falling from the dilapidated wall of the house: *Murray v. McShane*, 52 Md. 217; 36 Am. Rep. 367. In an action for injury to plaintiff's land from excavation by defendant on his adjoining land, whereby plaintiff's soil has broken away and fell, the fact that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land, is no defense: *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771. The owner of a building will not be held liable for damages caused by the falling of the walls of his building, though it appears that he was informed on Sunday (one day previous to the injury) that his walls were settling, unless it appears that the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended on the walls, would have taken immediate measures on that day to repair them: *Schwartz v. Gilmore*, 45 Ill. 454; 92 Am. Dec. 227, and note to *Zoebisch v. Tarbell*, 87 Am. Dec. 666.

LEWARK v. CARTER.

[117 INDIANA, 206.]

EXECUTION SALES. — Sale of personal property under execution passes only the right, title, and interest of the judgment debtor. If he has no interest, none passes by the sale to the purchaser.

THERE IS NO WARRANTY IN EXECUTION SALES; and if the sheriff sells personal property in good faith, he is not responsible to the purchaser for any defects in the title.

SHERIFF IS ONLY MINISTERIAL OFFICER, and does not warrant anything in connection with the sale by him of property upon an execution lawfully in his hands.

REPRESENTATIONS MADE BY DEPUTY SHERIFF AT SALE OF PERSONAL PROPERTY THAT TITLE IS GOOD will not render the execution plaintiff liable to the purchaser for a failure of title, in the absence of proof that the representations were made by his procurement.

STATEMENTS MADE BY DEPUTY SHERIFF IN RELATION TO TITLE OF PROPERTY OFFERED FOR SALE on execution are not within the scope of his authority. And the sheriff is not liable to a purchaser on account of such statements, where they are made by the deputy in good faith in the belief of their truth, and without the intent to deceive any person thereby.

REPRESENTATIONS ARE NOT FRAUDULENT when made for an honest purpose, and with fair reason for believing them to be true, although they may turn out to be untrue.

PLEADING AND PRACTICE. — TRIAL COURT MAY PROPERLY REFUSE LEAVE to plaintiff, after the evidence in the case has been all introduced, to file an amended complaint involving an entire change in the theory of the case.

D. V. Burns and A. Seidensticker, for the appellant.

F. Rand, J. M. Winters, and R. Clarke, for the appellees.

COFFEY, J. This action was brought by the appellant in the Marion superior court against the appellees, George H. Carter, sheriff of Marion County, and Fletcher and Churchman, to recover money paid by him on his bid for a horse sold by Carter at sheriff's sale.

The cause was tried by a jury, who returned a special verdict. On this verdict, judgment was rendered for the defendants.

Lewark appealed to the general term of the superior court, where the judgment of the special term was affirmed, and he now appeals to this court, where, as in the general term, he calls in question the correctness of the judgment on the special verdict.

The material facts in the case, as set forth in the verdict of the jury, are, that appellee Carter, as the sheriff of Marion County, held an execution issued upon a judgment rendered in the Marion superior court in favor of his co-appellees, Fletcher and Churchman, against Oliver P. Castle, Charles B. Hitchcock, Charles F. Cleaveland, and Robert H. Adams. Carter, as such sheriff, at the request of Fletcher and Churchman, the plaintiffs in said judgment, levied said execution on a certain bay horse as the property of the execution defendants. Due notice of the time and place of sale of the horse was given, and at the sale appellant became the purchaser, and paid the purchase price; and Carter, after satisfying the costs out of the money, paid the residue to the judgment plaintiffs, Fletcher and Churchman, in part satisfaction of their judgment.

Before the levy of said execution, Hitchcock informed Corbaley, one of Carter's deputies, who was at the time in quest of property on which to levy the same, that he, Hitchcock, did not own the horse; and one Glazier, the book-keeper of Adams, told said Corbaley that the horse belonged to one Harry Walker.

The sale was made by Harding, another of Carter's deputies, who, at the time, and in making the sale, in answer to a

question put to him, publicly, by one William O. Patterson, at the sale, said that the title to the horse was clear and all right; and the plaintiff, hearing the statement, and relying on it, and believing it to be true, made his bid, but would not have bid had such statement not been made.

At the time Harding made the statement, he had no knowledge as to whether it was true or not, and no actual intention of deceiving any one thereby, but believed the same to be true.

The execution defendant, Hitchcock, had owned the horse, but had sold it before the execution plaintiffs, Fletcher and Churchman, had obtained their judgment, to his co-defendant Adams, who, before the date of said judgment, sold it to Harry Walker. Walker had intrusted the possession of said horse to the firm of Cleaveland and Brown, successors to Cleaveland and Adams, who were execution defendants.

Walker had no knowledge that the horse had been levied upon until after the sale. He brought an action against the appellant for possession of the horse, in the proper court, and recovered. The appellees were notified of the pendency of the action, and requested to defend it, but they failed to do so. After the termination of that action, appellant demanded of the appellees repayment to him of the amount bid for said horse, which was refused.

A sale of personal property under execution passes only the right, title, and interest of the judgment debtor. If the debtor has no interest, none passes by the sale to the purchaser. There is no warranty in judicial sales, and if the sheriff sells in good faith, he is not responsible to the purchaser for any defects in the title. A sheriff is only a ministerial officer, and does not warrant anything in connection with the sale by him of property upon an execution lawfully in his hands. The purchaser stands in the situation of a purchaser of real estate who has taken a conveyance without warranty. The purchaser has a right to what he gets, and no more. *Caveat emptor* is the rule. He cannot avoid payment by showing that the goods belonged to some one else; but if an innocent purchaser, he may have redress in equity against the execution debtor whose debt he has paid: *Harrison v. Shanks*, 13 Bush, 620; *State v. Prime*, 54 Ind. 450; *Brunner v. Brennan*, 49 Id. 98; *Neal v. Gillaspy*, 56 Id. 451; 26 Am. Rep. 37; *Rorer on Judicial Sales*, sec. 1051.

We think it clear from these authorities that, in the absence of the representations made at the sale, none of the defend-

ants could be held responsible for the failure of title to the horse purchased by the appellant. It remains to inquire whether, by reason of such representations, they, or any of them, became liable to refund to the appellant the money paid by him for the horse to which the execution defendants had no title.

It appears that the horse was levied upon by the direction of the appellees Fletcher and Churchman. It also appears that the horse had previously belonged to the execution defendants, but that he had been sold. At the time of the levy, he was not in the possession of the owner, and there is nothing in the finding to indicate that Fletcher and Churchman, at the time they directed the levy, were acting in bad faith. They were not present at the time the representations were made, and they were made without their knowledge or procurement. If they are liable, therefore, it must be because they sustained such a relation to the sheriff as principal and agent, or otherwise, as rendered them liable for the conduct of the sheriff in conducting the sale.

Murfree on Sheriffs, at section 1002, states the law thus: "While it is true that in a certain sense, and for some purposes, the sheriff may be regarded as the agent of the plaintiff, he is not such agent in conducting a sale under execution; and in the absence of proof of actual instructions given by the plaintiff, and followed by the officer, the former cannot be held responsible for misrepresentations of title, or other material circumstances, made by the latter. He is not, like an auctioneer, the agent of both parties, but of the law, and is presumed, in the absence of proof to the contrary, to have acted strictly according to the mandate of his writ. The rule of *caveat emptor* can only be modified so as to charge the plaintiff by representations or guaranties made by the sheriff or other persons on behalf of the plaintiff, and brought home to the latter by sufficient proof." See also *Weidler v. Farmers' Bank*, 11 Serg. & R. 134.

In the absence of some proof that the representations of the deputy sheriff were made by the procurement of the appellees Fletcher and Churchman, we do not think that they can be held responsible. The verdict of the jury is presumed to find every fact in the case warranted by the proof; and as it does not appear from such verdict that these appellees had any connection with the representations made at the time of sale, we hold that they are not liable to appellant.

Is the appellee Carter liable to the appellant on account of the representations made by his deputy?

It may be conceded that a sheriff is liable for the defaults of his deputies by non-feasance or malfeasance in the duties of their office enjoined by law, and that their acts and omissions are to be regarded, when within the scope of their authority, as his acts and omissions: *Snell v. State*, 43 Ind. 359; *Marshall v. Hosmer*, 4 Mass. 60.

It is no part of the duty of a deputy sheriff to make representations as to the title to the property he sells on execution. His plain duty is to follow the commands of his writ, and his statements in relation to the title of the property are not within the scope of his authority. In this case, however, it appears that the deputy made the representations in good faith, and without any intention of deceiving any person thereby, and believing them to be true. The modern doctrine undoubtedly is, that fraud may exist without knowledge of the untruth of the representations made to induce a party to enter into a contract. But it must appear that such representations were fraudulent.

Representations made for an honest purpose, and with fair reason for believing them to be true, are not fraudulent, although it may turn out that they were not true: *Furnas v. Friday*, 102 Ind. 129; *Watson Coal etc. Co. v. Casteel*, 68 Ind. 476.

In our opinion, it does not appear that the representations made by Harding at the sheriff's sale were fraudulent. For this, and the reasons stated above, we are of the opinion that the appellee Carter is not liable in this action.

After the testimony in this case had all been introduced, the appellant offered to file an amended second paragraph of complaint, which the court, on objection made by the appellees, refused to allow. The amended second paragraph offered by appellant is set out in a proper bill of exceptions, and appears to be a complaint seeking to set aside the sale made by the sheriff on substantially the facts set up in the complaint in this cause. Had the court permitted appellant to file this amended paragraph, it would have become necessary to make issues upon it, the mode of trial would, perhaps, have been different from the one just closed, and the execution defendants, who were interested in maintaining the credit that had been entered by reason of the sale of the horse, would have been entitled to be heard. We do not think the court

erred in refusing to allow appellant to file this second paragraph of complaint. It was an entire change in the theory of the appellant's case.

We find no error in the record for which the judgment below should be reversed.

Judgment affirmed.

JUDICIAL SALES. — THE GENERAL RULE IS, THAT A PURCHASER AT AN EXECUTION SALE acquires whatever estate and interest the defendant in execution owns and possesses, and succeeds to his title, rights, and privileges, including possession: *Cotton v. Carlisle*, 85 Ala. 175; 7 Am. St. Rep. 29, and note 31; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429, and note 433; *Parish etc. School Directors v. Edrington*, 40 La. Ann. 633. There is no warranty of title at an execution sale. The purchaser takes just what title the defendant in the execution had, and buys at his peril; for the rule of *caveat emptor* applies to purchasers at execution sales: *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613; *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and cases collected in note 102; note to *Meher v. Cole*, 5 Am. St. Rep. 104; *Humphrey v. Wade*, 84 Ky. 391; *Smith v. Northam*, 82 Va. 937.

FRAUD — FALSE REPRESENTATIONS. — In the absence of artifice, a sale will not be set aside on the ground of fraudulent representations, if the vendor really believed them true, and the vendee had equal opportunity for ascertaining their falsity: *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716; *Griswold v. Sabin*, 51 N. H. 167; 12 Am. Rep. 76; *contra*, *Frenzel v. Miller*, 37 Ind. 1; 10 Am. Rep. 62; *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313. But an action for deceit will lie against one who makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge, when he does not know whether it is true or false, with intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with a reasonable degree of prudence, is thereby deceived, and induced to do or refrain from doing something to his damage and injury: *Busterred v. Farrington*, 36 Minn. 320.

ROBINSON v. HUGHES.

[117 INDIANA, 293.]

EXEMPTIONS — RIGHT TO CLAIM EXEMPTION BY BECOMING HOUSEHOLDER AFTER LEVY. — Debtor who was unmarried when judgment was obtained against him, and whose property was levied upon under an execution issued on the judgment, and advertised for sale, has a right to claim the benefit of the exemption laws, if between the date of levy and the date fixed for sale he marries and becomes a *bona fide* householder, and he is entitled to enjoin the sale.

J. C. Blacklidge, W. E. Blacklidge, and B. C. Moon, for the appellants.

J. F. Morrison, R. Vaile, F. Cooper, and A. Shewmon, for the appellee.

COFFEY, J. On the thirteenth day of November, 1885, the appellants, Robinson and Robinson, recovered a judgment in the Howard circuit court, on a promissory note, against the appellee for the sum of \$182.05. An execution was issued by the clerk of said court on said judgment and placed in the hands of the defendant McReynolds, who at the time was the sheriff of Howard county. The execution was duly levied upon the property of the appellee by said sheriff, and was by him advertised for sale.

At the time said judgment was rendered, and at the time the property of the appellee was levied upon and advertised for sale, the appellee was single, and was not a householder, but between the date of levy and the date fixed for sale he married and became a *bona fide* resident householder of the state of Indiana. He tendered to said sheriff the statutory schedule, duly verified, and demanded that his property be set off to him as exempt from execution and sale, the same being of less value than six hundred dollars.

The sheriff refusing to comply with such demand, this action was brought to enjoin the sheriff from selling said property.

The court below held that the appellee was entitled to claim his property as exempt from levy and sale on said judgment and execution, and granted the injunction as prayed. From this ruling the defendants in said action appealed to this court, and by proper assignment of errors call in question the ruling of the court below.

It is contended by the appellants that by virtue of the levy they acquired a specific lien on the property of the appellee and the right to sell it in satisfaction of their debt, and that the appellee could not by any act of his divest such lien.

On the other hand, it is contended by the appellee that the exemption law is not for the benefit of the debtor, but that it is for the benefit of those dependent upon him for support and sustenance, and that the debtor, for their benefit, has the right at any time before sale to claim the property as exempt from execution and sale, without regard to the time when he became a *bona fide* resident householder of the state.

In some of the states it is held that the right to exemption cannot be created after the rights of creditors have vested: *Bowker v. Collins*, 4 Neb. 494; *Elston v. Robinson*, 21 Iowa, 531; *Reinbach v. Walter*, 27 Ill. 393; *Symonds v. Lappin*, 82 Ill. 213; *Thompson v. Pickel*, 20 Iowa, 490; *Hale v. Heaslip*,

16 Iowa, 451; *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Id. 595; *Rix v. McHenry*, 7 Cal. 89; *Mills v. Spaulding*, 50 Me. 57; *Upman v. Second Ward Bank*, 15 Wis. 450.

It is held in some of the other states of the Union that the marriage of the execution defendant after levy confers upon him the right to claim the benefit of the exemption laws: 1 Freeman on Executions, sec. 222; *Watson v. Simpson*, 5 Ala. 233; Thompson on Homestead and Exemption, sec. 319; *Irwin v. Lewis*, 50 Miss. 363; *Trotter v. Dobbs*, 38 Id. 198; *Letchford v. Cary*, 52 Id. 791; *Stone v. Darnell*, 20 Tex. 11; *Macmanus v. Campbell*, 37 Id. 267.

An examination of these authorities will reveal the fact that the question always depends upon the construction to be given to the numerous statutes upon the subject of exemption, all in some respects differing. The precise question here involved has never, to our knowledge, been decided by this court, but its solution must of necessity depend upon the proper construction of our statute providing for the exemption of property from levy and sale on execution.

The right to have a reasonable amount of property exempt from execution is a constitutional right, secured to every *bona fide* resident householder of the state. As the quantity to be exempted is not fixed by the constitution, it follows that it must be fixed by the legislature. It has been fixed by law at six hundred dollars. This law must be liberally construed: *Astley v. Capron*, 89 Ind. 167; *Butner v. Bowser*, 104 Id. 255.

The debtor is entitled to select the property he desires to exempt from execution and sale, and he may file his schedule and make such selection at any time before sale: *Pate v. Swann*, 7 Blackf. 500; *Eltzroth v. Webster*, 15 Ind. 21; 77 Am. Dec. 78; *State v. Read*, 94 Ind. 103.

The contention of the appellants, that because the levy in this case satisfied the execution, they are therefore entitled to sell the property, cannot be maintained. No such conclusion necessarily follows from the premises. Where a debtor owns more than six hundred dollars' worth of property, a levy satisfies the execution to the same extent it is satisfied in this case, and yet it is fully settled by the above authorities that he may file his schedule and exempt the property levied upon from sale at any time before the sale is actually made, and leave the sheriff free to make a new levy. So in this case, if the property levied on is set off to the appellee under his claim to have it exempt from execution, it will be the duty of

the sheriff to return his writ unsatisfied, leaving the appellants free to sue out another execution on their judgment at any time.

Our statute, in terms, secures to every *bona fide* resident householder of the state six hundred dollars' worth of property as exempt from execution, and our opinion is, that the appellee in this case, coming as he does within the terms of the statute, is entitled to claim his property as exempt from execution. To hold otherwise would be to create an exception which the legislature did not in terms declare, and one which we do not feel warranted in creating by construction.

We do not think that the circuit court erred in granting the injunction sought by the appellee.

Judgment affirmed. _____

EXEMPTIONS. — **THE MARRIAGE OF AN EXECUTION DEBTOR** after levy on personality, but before sale, does not entitle him to a homestead exemption: *Pender v. Lancaster*, 14 S. C. 25; 37 Am. Rep. 720.

WILSON v. DONALDSON.

[117 INDIANA, 356.]

STATUTES — CONSTRUCTION. — **STATUTE IS NOT TO BE ISOLATED FROM GREAT BODY OF LAW** of which it forms a part, but is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes.

PRACTICE — SERVICE OF PROCESS UPON NON-RESIDENT. — Resident of another state who goes into the state of Indiana to testify as a witness in an action in which he is a party cannot be legally served with a summons at the suit of the party plaintiff in the action he goes to defend. Indiana Revised Statutes of 1881, section 312, providing for the service of summons upon non-residents, is not applicable to such a case.

G. W. Paul, M. D. White, and J. E. Humphries, for the appellant.

P. S. Kennedy, S. C. Kennedy, and W. T. Brush, for the appellee.

ELLIOTT, C. J. The appellee was served with summons in an ordinary civil action. He pleaded in abatement these facts: That he then was, and had been for more than eighteen years, a citizen and resident of the state of Kentucky; that during the April term of the Montgomery circuit court, he left his home in the state of Kentucky for the sole purpose of defending an action pending against him in that court, and

testifying as a witness therein; that the action was brought against him by the plaintiff, and the cause was called for trial on the 24th of May, 1882; that the defendant announced that he was ready for trial, and the court ordered the trial to proceed, whereupon the plaintiff dismissed his action, and withdrew all the papers from the files of the court; that immediately after the dismissal was entered, Wilson, the plaintiff, refiled his complaint, and caused a summons to issue; that the defendant started home at once, but was served with summons while he was on his way home, although he was still in Montgomery County.

The contention of appellant's counsel is, that the fact that the appellee was in Indiana in attendance upon court as a party to an action which he had brought against him, and for the purpose of testifying as a witness, does not entitle him to avoid the summons served upon him while in this state. Our statute is broad enough to sustain this contention if we take it apart from all the other rules of the law; for it provides that, in cases of non-residents, an action may be commenced and summons served in any county where they may be found: R. S. 1881, sec. 312. But a statute is not to be isolated from the great body of law of which it forms a part; on the contrary, it is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes: *Bradley v. Thixton*, 117 Ind. 255.

The counsel are therefore in error in completely isolating the statutory provision we have referred to, since if we should find a well-established principle of law exempting non-residents who are in this state for the purpose of attending court as parties or witnesses, we should be bound to construe the statute with reference to that principle; for we could not hold that the legislature meant to entirely disregard it, and establish an independent rule. Such narrow views as those of counsel, if allowed sway, would mar the symmetry of our system of jurisprudence, and greatly impair its usefulness. Laws are necessarily expressed in general terms; but these general terms do not, and cannot, embrace all cases. An element is often present which takes a case out of the operation of the general words of the statute, and that element is here present: *Broom's Legal Maxims*, 43.

We cannot, as the appellee's counsel urge us to do, allot any controlling force to section 2658 of the statute, which exempts persons engaged in necessary attendance upon courts

from arrest on civil process, for the reason that there was no attempt to arrest the appellee. All that the appellant attempted to do was to compel the appellee to appear and answer in an ordinary civil action.

The fact that an arrest is not, under our system of jurisprudence, made on ordinary civil process supplies a substantial reason for denying to the ancient decisions a controlling influence, but not for entirely impeaching the validity of their reasoning. There are strong reasons found in some of the old cases why a citizen of a sister state who comes here to defend one action should not be bound to submit to the service of a summons in another action while here in necessary attendance at court. It is his privilege, under our laws, to testify in his own behalf; and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a non-resident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions.

It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right, because he is willing to trust our courts and our laws without removing his case to the federal courts, or refusing to put himself in a position where personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil

actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders. We know that there is some conflict among the decided cases; but in weight and in reason the authorities range themselves in strong array in support of the doctrine we have outlined. It was certainly the ancient rule, and although, as we have said, something of the reason for the ancient rule has been dissipated, there yet remains much reason for it. There is, indeed, a stronger reason for the rule in states where, like ours, parties may be witnesses than in states where the old common-law rule excluding them prevails; and for this reason the old rule protecting witnesses has much more strength in states where parties may be witnesses than in states where the ancient common-law rule is still in force. The authorities, ancient and modern, are in substantial harmony upon the proposition that a witness from a foreign jurisdiction is under the protection of the law, although some of the cases deny this immunity to parties. The reason for this rule regarding witnesses, as generally given, is, that, as they cannot be compelled to leave their own state, they should, as far as possible, be encouraged to voluntarily come into the state where the action is pending, and give their testimony in open court. But the policy of protection, as sound principles require, and many courts assert, extends as well to parties as to witnesses.

In *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, Cooley, C. J., said: "We think the case is within the principle of *Watson v. Judge of Superior Court*, 40 Mich. 729, and that the writ should issue. Public policy, the due administration of justice, and protection to parties and witnesses alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also. The following cases may be referred to for the general reasons: *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Dixon v. Ely*, 4 Edw. Ch. 557; *Clark v. Grant*, 2 Wend. 257; *Seaver v. Robinson*, 3 Duer, 622; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Hall's Case*, 1 Tyler, 274; *In re Healey*, 53 Vt. 694; *Miles v. McCullough*, 1 Binn. 77; *Halsey v. Stewart*, 4 N. J. L. 366; *Dungan v. Miller*, 37 Id. 182; *Vincent v. Watson*, 1 Rich. 194; *Sadler v. Ray*, 5 Id. 523; *Martin v. Ramsey*, 7 Humph. 260; *Dickinson's Case*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217; *May v.*

Shumway, 16 Gray, 86; 77 Am. Dec. 401; *Thompson's Case*, 122 Mass. 428; 23 Am. Rep. 370; *Ballinger v. Elliott*, 72 N. C. 596; *Parker v. Hotchkiss*, Wall. C. C. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Arding v. Flower*, 8 Term Rep. 534; *Newton v. Askew*, 6 Hare, 319; *Persse v. Persse*, 5 H. L. Cas. 671. See also *Matter of Cannon*, 47 Mich. 481. The case of *Case v. Rorabacher*, 15 Id. 537, is different. In that case the party claiming the privilege was attending court within the jurisdiction of his residence."

Very much the same ruling as that announced by Chief Justice Cooley was made by the court of appeals of New York, in *Matthews v. Tufts*, 87 N. Y. 568, where it was said: "In *Van Lieu v. Johnson*, decided March, 1871, and referred to in *Person v. Grier*, 66 N. Y. 124, a majority of this court were of opinion that a summons could not be served upon a defendant, a non-resident of the state, while attending a court in this state as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority."

We do not cite the authorities adduced by the court, for the reason that most of them are collected in the quotation made from the opinion of Chief Justice Cooley.

Mr. Rorer says: "It is the policy of the law to protect suitors and witnesses from service of process in civil actions, whether the process be such as required their arrest, or be merely in the nature of a summons. Service in such cases will be set aside, as well upon general principles as upon positive law, if there is such": Rorer on Interstate Law, 26.

The only case cited by the appellant's counsel which directly opposes the opinion which we accept as the correct one is that of *Bishop v. Vose*, 27 Conn. 1, and that decision is not supported by authority, nor are any satisfactory reasons assigned for the conclusions of the court. *Greer v. Young*, 120 Ill. 184, was the case of a party who came into Illinois to attend the taking of depositions, and not the case of a defendant in attendance at court.

In *King v. Phillips*, 70 Ga. 409, there was no pleading questioning the service, and it was on this point that the case was decided.

The facts in *Robbins v. Lincoln*, 27 Fed. Rep. 342, were, that the person served with process was an attorney, and not a party.

In *Smith v. Jones*, 76 Me, 138, 49 Am. Rep. 598, the question arose in a collateral action, and there the plaintiff sued to recover damages for an illegal arrest. *Catlett v. Morton*, 4 Litt. 122, simply decides that a member of the legislature is not so far privileged as to be exempt from answering a summons in an ordinary civil action.

Our ultimate conclusion is, that a person who comes into this state for the purpose of testifying as a witness in an action in which he is a party cannot be legally served with a summons at the suit of the party plaintiff in the action he came here to defend, and that our statute does not apply to such a case.

Judgment affirmed.

STATUTES — CONSTRUCTION OF. — COURTS WILL NOTICE CONTEMPORANEOUS HISTORY IN CONSTRUING STATUTES: *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 581; *Munson v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 582; *Frankland v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 582, and note; *Connecticut M. L. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655. Contemporaneous legislation is the best standard of the meaning of laws: *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 581; *Will of Warfield*, 22 Cal. 51; 83 Am. Dec. 49. Statutes taking effect simultaneously should be construed together in determining their effect: *Bishop v. Boyle*, 9 Ind. 169; 68 Am. Dec. 615; compare *Bruce v. Schuyler*, 4 Gill, 221; 46 Am. Dec. 447; *Chestnut v. Shane*, 16 Ohio, 599; 47 Am. Dec. 387; *Doswell v. Buchanan*, 3 Leigh, 365; 23 Am. Dec. 280; *McCartee v. Orphans' Asy. Soc.*, 3 Cow. 437; 18 Am. Dec. 516; *Montesquieu v. Heil*, 4 La. 51; 23 Am. Dec. 471. Existing laws must be construed together, and reconciled if possible: *Waddell v. Commonwealth*, 84 Ky. 267. A statute must be construed in the light of the settled policy of the state with reference to the subject-matter as indicated by previous legislation. Contemporaneous construction by those procuring an act is to be regarded in construing it. The spirit of the law, and not the letter, must control in its construction: *Barbour v. City of Louisville*, 83 Id. 95. The practical construction given to a statute through a long period, and acquiesced in by all departments of the government, should control the court in construing it, even though that construction may contravene the letter of the law: *Harrison v. Commonwealth*, 83 Id. 162. A prior construction of a law by the courts will be followed, in the absence of any evidence of a different intent as adopted, by a re-enactment of the law in the same terms as when so construed: *Sanders v. St. Louis etc. Anchor Line*, 97 Mo. 26. Hence it is that repeals of existing laws by implication merely are not favored: *County of Saguache v. Decker*, 10 Col. 149. And it has been held that a later statute will not repeal a former one by implication, unless they are irreconcilably inconsistent, or it appears that the legislature intended the later act to take the place of the former one: *Mauker v. Faulkner*, 94 Mo. 430; *Adams Ex. Co. v. City of Lexington*, 83 Ky. 657. But a subsequent statute revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, will operate as a repeal of the former statute: *Keese v. City of Denver*, 10 Col. 112.

PROCESS—SERVICE OBTAINED BY FRAUD.—Where a person by fraud and deceit inveigles another into the jurisdiction of the court for the purpose of suing him and serving a summons upon him in that jurisdiction, the summons and the service of the same will be set aside; for such abuse of judicial process cannot be tolerated by any court of justice: *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523. But admitting that a defendant to a suit instituted in one state could not be brought into the court under process served in another state, yet if such defendant appears, and files a motion to quash the service of such writ, he thereby waives all other objections to the writ; and even though the motion to quash be sustained, it does not dismiss the suit, but simply abates the writ, and the plaintiff may serve another writ on the defendant while he is within the state where the suit was instituted, provided the defendant can be reached by personal process: *Feibleman v. Edmonds*, 69 Tex. 334.

ELLIOTT v. ELLIOTT.

[117 INDIANA, 380.]

WILLS.—FUNDAMENTAL RULE IN CONSTRUCTION OF WILLS is, that the intention of the testator, if not inconsistent with some established rule of law, must control; and to ascertain that intention the courts will look to the circumstances under which he makes his will, as to the state of his property and his family.

WILLS.—ORDINARILY, NO TRUST WILL ARISE where a devise is made to one standing in the relation of parent, as such directions generally relate to the motive only of the testator or donor.

WILLS—CONSTRUCTION OF WORDS “MY CHILDREN,” IN DEVISE.—Devise of property to wife “to use and dispose of as she may think best for herself and my children,” bequeaths the property to the wife, charged with an implied trust for the use of herself and the testator’s children. And the words “my children” will be construed to mean the testator’s illegitimate children by the devisee, to the exclusion of his legitimate children by a former wife, where it is plain from the surrounding circumstances that such was his intention.

B. W. Langdon and T. F. Gaylord, for the appellant.

W. D. Wallace, for the appellees.

COFFEY, J. In 1845, George Elliott was married in England, and had as the issue of said marriage one son, William. His wife died in 1847, and in 1848 he married Jane Haywood, and had by her one son, Robert G. Elliott, who is the plaintiff in this suit. In 1851 he abandoned his wife and children, and came to the United States and located at Lafayette, where, in 1852, he married Mary Ann Dungan, never having been divorced from his wife in Great Britain. By her he had four children, who, together with Mary A. Elliott, are the defendants in this suit. In 1865, George Elliott died

in this state, leaving a will, which, omitting the formal parts, is as follows:—

“I give and devise to my beloved wife, Mary Ann Elliott, my real estate in the county of Tippecanoe and state of Indiana, described as follows [we omit the description], together with all the appurtenances thereto belonging, in fee-simple, that she may dispose of the same as she may think best for herself and my children.

“Item 2d. I devise and bequeath to my said wife all my money which I now have on hand, and all that may be on hand at the time of my decease, together with my household goods, for her to have and use as she may think best and proper for herself and my children; provided, that in case my beloved wife, Mary Ann Elliott, should marry after my decease, then, and in that case, it is my will that two thirds of all my property, both real and personal, shall descend in equal proportion to my children.

“Item 3d. I hereby nominate and appoint my said wife Mary Ann Elliott, executor of this my last will and testament, hereby authorizing and empowering her to compromise and discharge, as she may think proper, all my debts and all the claims due to me; and I hereby revoke all former wills.”

Both the wife in England and the son William are dead, having departed this life since the death of George Elliott. This suit is brought by Robert G. Elliott, the legitimate son by the second marriage, for the purpose of obtaining a construction of the will above set out, and to compel an accounting. The circuit court sustained a demurrer to the complaint, and the plaintiff excepted, and now prosecutes this appeal.

It is contended by the appellant that the will constitutes Mary Ann Elliott a trustee of the property thereby bequeathed to her for the use of the children of the testator, and that the word “children,” as used in the will, is to be construed as meaning legitimate children, and that as the children by Mary Ann Elliott are illegitimate, they have no interest in said property.

It is contended by the appellees that, by the terms of the will above set out, Mary Ann Elliott took the property bequeathed to her absolutely, and that no trust was created in favor of the children of George Elliott.

They further contend, that if the will is to be construed as creating a trust in favor of the children of George Elliott, then

it should be construed as creating a trust in favor of his children by Mary Ann Elliott only.

There is no allegation in the complaint to the effect that at the time George Elliott married Mary Ann Dungan, she then, or at any other time during his life, had any knowledge that he had a wife living. Neither is it alleged that she has again married since the death of George Elliott.

The first question for decision is, Did the will create a trust in favor of the children of George Elliott?

It will be observed that by item 1st the real estate therein described is bequeathed to her in fee-simple, that she might dispose of the same as she thought best for herself and the children of the testator.

The current of decisions of late years sets against the doctrine of converting the devisee or legatee into a trustee; and the courts now refuse to extend the doctrine, and will not imply a trust unless it appears from the will that such was the intention of the testator: Lewin on Trusts, 137.

Consequently, where a devise is made to one standing in the relation of parent, with directions touching the maintenance of children, ordinarily no trust will arise, as such directions generally relate to the motive only of the testator or donor. So when a bequest was made to one "to enable him to maintain the child," or to enable him "to maintain himself and family," or "towards the support and maintenance of her two children until they shall attain the age of twenty-one years," or "to A for her own use and benefit, absolutely, having confidence in her sufficient and judicious provision for her children," or "being well assured that she will husband the means left to her for the sake of herself and children," or "to be applied by her in the bringing up and maintenance of her children." It is held, in all such cases, that the legatee takes an absolute estate, and that no trust arises: *Van Gorder v. Smith*, 99 Ind. 404; *Parsons v. Best*, 1 Thomp. & C. 211; *Foose v. Whitmore*, 82 N. Y. 405; *Hunt v. Hunt*, 11 Nev. 442; *Williams v. Worthington*, 49 Md. 572.

But there is another class of cases, where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent, or other person standing in the relation of parent, and some direction or expressions are used in regard to the maintenance of his family or children. The question to be decided in this class of cases is, as in others, Did the testator intend to create

a trust and create an obligation? or did he merely state incidentally the motive which led to the gift? 1 Perry on Trusts, section 117, says: "In the following cases, a trust was clearly implied by the court: Where property was given, that 'he may dispose thereof for the benefit of himself and children,' or 'for his own use and benefit, and the maintenance and education of his children,' 'for the maintenance of himself and family,' 'at the disposal of the legatee for herself and her children,' or 'all overplus towards her support and her family,' or 'to A for the education and advancing in life of her children.'"

To the same effect is Lewin on Trusts, page 137. Lewin on Trusts, page 138, speaking of this class of trusts, says: "Where a trust is created, the person bound by it is the hand to administer it, and can sign a valid receipt for the fund, the subject of the trust. And the person bound by the trust is regarded in the same light as a committee of a lunatic or guardian of an infant; that is, he has a duty imposed upon him; but so long as he discharges that duty, he is entitled to the surplus for his own benefit, and the court requires from him no account retrospectively of the application of the fund, and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished, or will order payment to him on his undertaking to maintain the children properly, with liberty to the children to apply. Should the person bound by the trust become by misconduct unfit to maintain and educate the children, the court will not allow him to receive the fund; and should the fiduciary assign his interest, the court will inquire what part is needed for the maintenance and education of the children, and will give the surplus only to the assignee."

From these authorities we are of the opinion that the will of George Elliott, above set out, bequeaths to his widow, Mary Ann Elliott, the property of the deceased, charged with an implied trust for the use of herself and his children. Having reached this conclusion, it remains to be ascertained who is intended by the words "my children."

Here are two classes of persons to whom the words will apply, viz., two legitimate children in England, and four illegitimate children in this country. It may be conceded that when a man speaks of his children, he is ordinarily understood to mean his legitimate children. But where it is plain

from the surrounding circumstances that he used the words in a different sense, they cannot be given that meaning.

The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control, and to ascertain that intention the courts will look to the circumstances under which he makes his will, as to the state of his property and his family: *Jackson v. Hoover*, 26 Ind. 511.

Fourteen years prior to his death, George Elliott abandoned his wife and children in England and came to America, where he married another woman, by whom he had four children. In his will he bequeaths all his property, both real and personal, to the woman whom he married in America, in trust for the support of herself and his children, to be sold, and the proceeds expended as she might in her judgment deem best.

So far as appears from the record in this case, she had no knowledge of the existence of the plaintiff in this case; indeed, the legal presumption is that she had no knowledge that George Elliott ever had another wife, for had she possessed such knowledge she would be chargeable with the crime of living in open and notorious adultery. No such charge is made. The plaintiff, at the time of the death of his father, was about fifteen years of age, while the defendants herein were small children. In the light of these surrounding circumstances, can it reasonably be said that George Elliott, by his will, intended to provide for the plaintiff, and leave his children here unprovided for and unprotected?

The case of *Gelston v. Shields*, 78 N. Y. 275, is, in its facts, similar to this case. In that case Henry Shields, the testator, by his will, bequeathed certain of his property to his wife, Catharine, and bequeathed the remainder to his children, without naming them. After his death, one Jane Shields, or Jane Valentine, appeared, and, claiming to be his widow, instituted suit for a dower interest in his estate, and succeeded. She had two children, who claimed to be the legitimate children of Henry Shields, deceased; but the court, construing the will in the light of the surrounding circumstances, held that the testator, in bequeathing his property to his children, must have intended to bequeath it to his children by Catharine Shields, who was designated in the will as his wife. Great stress was placed upon the fact that the will named Catharine Shields as the guardian of the minor children of the testator.

So in this case, we think one strong circumstance in the case tending to show the intention of the testator is the fact that George Elliott constituted Mary Ann Elliott the trustee of his property, to be expended by her for the support of his children.

In our opinion the words "my children," in the will in question, mean the children of George Elliott by his wife Mary Ann Elliott. Such being our conclusion, it follows that the appellant has no interest in the property in controversy, and that the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

WILLS — CONSTRUCTION OF. — The fundamental and cardinal rule in the construction of wills is, that the intention of the testator must be carried into effect when not against the established rules of law, and in ascertaining such intention, the surrounding circumstances may be taken into consideration: *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 545; *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92, and note 97; *Baker's Appeal*, 115 Pa. St. 590; and in construing a will, no rule of construction will be allowed to defeat the plain intention of the testator, as gathered from the instrument as a whole: *Thackston v. Watson*, 84 Ky. 206; and the general intention of a testator, gathered from the whole will, must prevail over the rule that of two repugnant clauses the last must prevail: *Price v. Cole*, 83 Va. 343. In interpreting wills, the intention of the testator must be sought for and followed, but that intention must be looked for in the will itself; for the true inquiry is not what the testator meant to express, but what the words actually used by him do express: *Stokes v. Van Wyck*, 83 Va. 724. In construing wills, all of its provisions should be regarded, for the purpose of ascertaining the intention of the testator, and if any particular clause indicates an intent contrary to that manifest from the balance of the instrument, the general intent must prevail over the intent gathered from any particular clause: *McMurry v. Stanley*, 69 Tex. 227. When a will by its terms manifestly evidences that a different meaning is intended to be given to the use of words employed in expressing the testator's wish from that which would attach under their technical use, the technical use must give way to the testator's manifest intention: *Peet v. Commerce etc. Street R'y Co.*, 70 Tex. 522. Where a testator in his lifetime makes a gift to a person to whom by his will he has given a general legacy, with the intention that such gift should be a satisfaction of or a substitute for such legacy, the gift will operate as an ademption of the legacy; for the intention of the testator is the decisive point in the matter: *Cowles v. Cowles*, 56 Conn. 240.

WILLS — CONSTRUCTION OF CERTAIN WORDS. — The words "children" and "grandchildren" do not include "great-grandchildren": *Cummings v. Plummer*, 94 Ind. 403; 48 Am. Rep. 167; nor does the word "children" include "grandchildren," when used in a will, provided there are children who can take under the provisions of the instrument: *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396; *Cruse v. McKee*, 2 Head, 1; 73 Am. Dec. 186. But see *Estate of Schedel*, 73 Cal. 594, where "children" was construed to mean grandchildren. The children of a testator may be included under

the words "legal heirs," when such words are used by the testator clearly intending to mean his children: *Underwood v. Robbins*, 117 Ind. 308. But the term "legal heirs" has been held not to include children of the half-blood: *Id.* The words "nephews and nieces," used in a will, will not include the wives of the nephews: *Goddard v. Armory*, 147 Mass. 71.

THE SUBJECT OF PREGATORY TRUSTS is considered in notes to *Harrison v. Harrison's Adm'r*, 44 Am. Dec. 372-379, and *Knox v. Knox*, 48 Am. Rep. 494-499.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. SNYDER.

[117 INDIANA, 485.]

EVIDENCE. — **PHYSICIAN CALLED TO TESTIFY AS AN EXPERT MAY GIVE OPINION** as to the nature and extent of an injury sustained to the person, though based in part on statements made to him by the person injured descriptive of present pains or symptoms.

NEGLIGENCE. — **RIGHT TO RECOVER FOR PERSONAL INJURY CAUSED BY NEGLIGENCE OF RAILROAD COMPANY** is not impaired by the fact that the plaintiff was suffering from Bright's disease at the time he was injured.

NEGLIGENCE. — **WHERE PASSENGER IS IN PROPER PLACE IN CAR**, and makes no exposure of his person to danger, there can be no question of contributory negligence.

COMMON CARRIERS ARE BOUND TO USE the highest practicable degree of care to secure the safety of passengers, and any negligence on their part is actionable.

BURDEN OF OVERCOMING PRESUMPTION OF NEGLIGENCE ARISING from evidence of the occurrence of an accident and injury to a passenger is upon the carrier.

DUTY OF CARRIER IS NOT DISCHARGED BY TRUSTING to the reputation of the manufacturers and the external appearance of materials used in the construction and maintenance of its bridges. And the duty to test and inspect the materials does not end when they are put in place, but continues during their use.

S. O. Bayless and W. H. Russell, for the appellant.

T. H. Palmer, W. F. Palmer, B. K. Higinbotham, and M. Bristol, for the appellee.

ELLIOTT, C. J. The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White River, and the appellee severely injured.

Dr. Bowles, an expert witness called by the appellant, gave an opinion as to the nature and extent of the injury sustained by the appellee, and on cross-examination it was developed that his testimony was in part based on statements made to him by the appellee.

Waiving all questions of practice, and deciding the appellant's motion to strike out as if it were properly restricted to the alleged incompetent part of the testimony, we have no hesitation in deciding that the trial court did right in overruling the motion. As we have often decided, the physical organs of a human being cannot be inspected by the eyes of a surgeon, and the statements of the sufferer must of necessity be taken by the surgeon. It is not possible for any surgeon, by a mere external examination, to always discover the character of an injury, and properly describe or treat an injured man; and for this reason, if for no other, the statements of the injured person, descriptive of present pains or symptoms, are always competent, although narratives of past occurrences are inadmissible. On this point, our own decisions are harmonious, and they are right upon principle, and are well supported by authority: *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312; *Louisville etc. R'y Co. v. Falvey*, 104 Ind. 409; *Louisville etc. R'y Co. v. Wood*, 113 Id. 544; *Board etc. v. Leggett*, 115 Id. 544; *Hatch v. Fuller*, 131 Mass. 574; *Atchison etc. R. R. Co. v. Johns*, 36 Kan. 769; *Quaife v. Chicago etc. R'y Co.*, 48 Wis. 513; 33 Am. Rep. 821. From these decisions we shall not depart.

The fact that the appellee was suffering from Bright's disease at the time he was injured does not impair his right of recovery. The rule is this: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages": *Ohio etc. R. R. Co. v. Hecht*, 115 Ind. 443; *Louisville etc. R'y Co. v. Wood*, *supra*; *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; *Terre Haute etc. R. R. Co. v. Buck*, 96 Id. 346; 49 Am. Rep. 168; *Ehrgott v. Meyer*, 96 N. Y. 246; 48 Am. Rep. 622; *Jucker v. Chicago etc. R'y Co.*, 52 Wis. 150; *Denver etc. R'y Co. v. Harris*, 122 U. S. 597; *Lake Shore etc. R'y v. Rosenzweig*, 113 Pa. St. 519; *Houston etc. R'y Co. v. Leslie*, 57 Tex. 83.

The rule we have stated is thus expressed in one of our best text-books: "Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, the defendant's negligence will still be held to be the proximate cause": *Shearman and Redfield on Negligence*, 4th ed., sec. 742. The instructions clearly and properly state the law on this subject.

The court did not err in instructing the jury as to the de-

gree of care required of the appellant, at least not as against the appellant. The rule is well settled that carriers are bound to use the highest practicable degree of care to secure the safety of passengers.

There was no evidence of contributory negligence on the part of the appellee, and the court might well have refused any instruction at all upon that point. Where a passenger is in his proper place in the car, and makes no exposure of his person to danger, there can be no question of contributory negligence. Decisions like that of *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279, in cases of persons injured at a railroad crossing, are not applicable to such a case as the one at our bar.

The law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable: *Bedford etc. R. R. Co. v. Rainbolt*, 99 Ind. 551.

The law will not tolerate any negligence on the part of carriers, although they are not insurers of the safety of their passengers.

The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier: *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392; *Terre Haute etc. R. R. Co. v. Buck*, *supra*; *Cleveland etc. R. R. Co. v. Newell*, *supra*; *Bedford etc. R. R. Co. v. Rainbolt*, *supra*; *Anderson v. Scholey*, 114 Ind. 553.

In *Louisville etc. R'y Co. v. Pedigo*, 108 Ind. 481, the rule was applied in a case growing out of the same occurrence as that in which the appellee was injured.

The twenty-second instruction asked by the appellant, and refused, reads thus: "The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances."

This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the

standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skillfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use; for the company is bound to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements: *Manser v. Eastern etc. R'y Co.*, 3 L. T., N. S., 585; *Texas etc. R'y Co. v. Suggs*, 62 Tex. 323; 21 Am. & Eng. R. R. Cases, 475; *Stokes v. Eastern etc. R'y Co.*, 2 Fost. & F. 691; *Robinson v. New York etc. R. R. Co.*, 9 Fed. Rep. 877; *Richardson v. Great Eastern R'y Co.*, L. R. 10 Com. P. 486; L. R. 1 C. P. D. 342; *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346; *Funk v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517; *Alden v. New York Central R. R. Co.*, 26 N. Y. 102; 82 Am. Dec. 401.

The decision in the case of *Grand Rapids etc. R. R. Co. v. Boyd*, 65 Ind. 526, is not in conflict with this doctrine, for in that case an inspection was made.

Judgment affirmed.

PERSONAL INJURY. — A PHYSICIAN WHO HAS PRACTICED MEDICINE AND SURGERY for more than twenty years, and who has attended plaintiff professionally for two months after the injury, may, after stating his condition and the character of his wounds at the time he attended him, give his opinion as to the probable results of plaintiff's injuries: *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432; *Buel v. New York Cent. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271; *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. 487; 91 Am. Dec. 67. Representations of sick persons of the nature, symptoms, and effects of the malady under which they are at present laboring are admissible, even though not made to medical attendant: *Central R. R. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31, and see extended note 39, on the admission of statements made by sick or injured persons to the attending physician. See also *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7

Am. St. Rep. 458, and note 465. In an action for personal injuries, it is competent for the attending physician to testify as to what the injured party informed him, as to the pains he suffered, etc. And a medical expert may testify as to the probable results which would attend certain injuries: *Louisville etc. R'y Co. v. Wood*, 113 Ind. 544.

CARRIERS OF PASSENGERS—CARE REQUIRED.—The duty of railways engaged in the transportation of passengers, whether by freight or passenger trains, is to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its negligence: *New York etc. R'y Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451, and note 457; *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483, and note 490; *Topeka City R'y Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754, and note 765. A carrier of passengers, whether by street-cars drawn by horses through the streets of a city, or by steam-cars from city to city, is bound to use extraordinary diligence; and in cases of injury, the presumption of negligence is always against the carrier: *City and Suburban R'y v. Findley*, 76 Ga. 311.

WHETHER FACT THAT PERSON KILLED OR INJURED WAS SUFFERING FROM DISEASE, CURABLE OR INCURABLE, MAY BE GIVEN IN EVIDENCE AS A DEFENSE OR IN MITIGATION OF DAMAGES.—The great weight of authority undoubtedly sustains the doctrine of the principal case, that in an action for an injury to the plaintiff, caused by the negligence of the defendant, the fact that the plaintiff, at the time of the injury, was suffering from a disease or weakness, curable or incurable, although its tendency was to aggravate the injury caused by the negligence, does not impair the plaintiff's right of recovery. The defendant's negligence is still to be regarded as the proximate cause, and the plaintiff is entitled to full compensatory damages. See, in addition to the authorities cited in the opinion to the principal case, *Louisville etc. R. R. Co. v. Jones*, 108 Ind. 551; *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342; 41 Am. Rep. 41; *Barbee v. Reese*, 60 Miss. 906; *Baltimore City Pass. R'y Co. v. Kemp*, 61 Md. 74; *Fitzpatrick v. Great Western R'y Co.*, 12 U. C. Q. B. 645. Thus where a person was injured by the negligence of a municipal corporation in failing to keep its streets in repair, and suffered damage greatly in excess of what he would have suffered but for the fact that at the time of the injury he was afflicted with scrofulous disease, the court nevertheless held that the corporation was as much bound to keep its streets in repair for the sick and infirm as for the well, and that it was liable for the whole damage: *Stewart v. Ripon*, 38 Wis. 584. So where action was brought against a railroad company to recover damages on account of personal injuries received by the plaintiff's intestate, resulting in her death, and alleged to have been caused by the negligence of the defendant, it was held that if the deceased, at the time of the injuries complained of, was afflicted with an incurable disease, which would have caused her death in due course of time, but her death was hastened by the injuries received, the defendant company would be liable; and if she was at the time suffering from pneumonia, or incipient pneumonia, and died of that disease, it could not be assumed, as matter of law, that the injuries did not hasten her death, by impairing her strength and ability to resist disease: *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376. So where a pregnant woman was injured, resulting in malformation of the child, and its subsequent delivery still-born, the author of the negligence was held liable for the whole damage: *Shartle v. Minneapolis*, 17 Minn. 308; and to the same effect are *Oliver v. La Valle*, 36 Wis. 592; *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342; 41 Am. Rep. 41; *Chicago etc. R. R. Co. v. Hunerberg*, 16

Ill. App. 387; *Fitzpatrick v. Great Western R'y Co.*, 12 U. C. Q. B. 645. So where a passenger was injured by the negligence of a railroad company, and while suffering from such injury was again injured by the fault of the same company, it was held that he could recover for the second injury, although a person well and sound might have suffered no ill effects therefrom: *Allison v. Railroad Co.*, 42 Iowa, 274. That the injury resulting from the negligence of the defendant may have been aggravated or more easily caused by reason of the fact that the plaintiff had received a former injury cannot affect the question of the right to or the measure of damages: *Driess v. Frederick*, Sup. Ct. Tex., 1889. The duty of care, and of abstaining from injuring another, is due to the weak, the sick, and the infirm equally with the healthy and strong, and when that duty is violated, the measure of damage is the injury inflicted, even though that injury might have been aggravated, or might not have happened at all, but for the peculiar condition of the person injured: *Lapleigne v. Railroad and Steamship Co.*, 40 La. Ann. 657; *Allison v. Railroad Co.*, 42 Iowa, 274; *Stewart v. Ripon*, 38 Wis. 584. Thus in an action against a common carrier for injuries received by a passenger by reason of its negligence, it is no defense that the injuries would not have occurred, or would not have been so great, had the passenger been in good health: *Owens v. Railroad Co.*, 95 Mo. 169. And where, shortly after an injury to a female passenger, a cancer was developed at the place on her person where she was injured, it was held that if the jury believed, from all the evidence, that the cancer was the natural and proximate consequence of the blow received, by the negligent act of the defendant, it would properly form an element to be considered in awarding damages for the pain and injury suffered by the plaintiff, and the fact that she may have had a tendency or predisposition to cancer could afford no proper ground of objection to her claim: *Baltimore City Pass. R'y Co. v. Kemp*, 61 Md. 74. So it is held that although the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident, and might never have developed but for it, the party in fault will be liable for the entire damage as the direct result of the accident: *Lapleigne v. Railroad and Steamship Co.*, 40 La. Ann. 661; and see *Houston etc. R. R. Co. v. Leslie*, 57 Tex. 83. The aggravation of an existing disease or ailment by reason of the negligent acts of another may, therefore, be shown in evidence, and damages may be recovered to the extent of the injury thereby caused, in all proper cases, where the complaint or declaration is so framed as to admit of such proof: *Wilkinson v. Detroit Steel and Spring Works*, Sup. Ct. Mich., 1889; *Bray v. Latham*, Sup. Ct. Ga., 1889; *Louisville etc. R. R. Co. v. Jones*, 108 Ind. 551; and see *Thurstin v. Luce*, 61 Mich. 292. And where, in an action for a fatal injury by negligence, it becomes a question whether death resulted from the injury or from some disease with which it had become involved, the party causing the injury cannot escape full liability without showing that death must have resulted if the injury had not been inflicted: *Beauchamp v. Saginaw Min. Co.*, 50 Id. 173; 45 Am. Rep. 30; and see *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376. So in cases of personal injury caused by the negligence of another, although the physician who attended the injured person may have omitted to apply the remedy most approved in similar cases, by reason whereof the damage may not have been diminished as much as it otherwise would have been, yet the person causing the original injury is liable for the actual damage: *Loeser v. Humphrey*, 41 Ohio St. 378; 52 Am. Rep. 86; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200; *Pullman Palace Car*

Co. v. Bluhm, 109 Ill. 20; 50 Am. Rep. 601; *Santer v. New York etc. R. R. Co.*, 66 N. Y. 50; 23 Am. Rep. 18.

In conflict with the rule asserted in the principal case, and so well sustained by the current of authority elsewhere, is a decision of the supreme court of Colorado, holding that where the physical condition of the person injured is, at the time of the injury, such that the injuries caused by the negligence are thereby aggravated, the author of the injury is not liable for that aggravation: *Pullman Palace Car Co. v. Barker*, 4 Col. 344; 34 Am. Rep. 89. The view taken by the court was, that while persons who are ill have a right to enter and travel in the cars of a railroad company, and, as a common carrier of passengers, the company has no right to prevent them, yet the increased risk arising from conditions of health affecting their fitness to travel, and certainly where such conditions are unknown to the carrier, must be assumed by the passenger; citing *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607, 613; 97 Am. Dec. 478; *Hobbs v. London etc. R'y Co.*, L. R. 10 Q. B. 111. A similar view is entertained by the supreme court of Tennessee, holding that persons suffering from physical ailments, or otherwise unable to care for themselves, and who travel on railroad trains, must provide proper assistance, it not being the duty of the conductor, in the absence of instructions from the railroad company, to render such assistance: *Louisville etc. R. R. Co. v. Fleming*, 82 Tenn. 128. It is, however, said of the case of *Pullman Palace Car Co. v. Barker*, *supra*, that it is "unsustained by authority": *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342; 360; 41 Am. Rep. 41; "that it cannot be supported on principle": *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346, 355; 49 Am. Rep. 169; and that "the doctrine is not sound, and is not in accord with the weight of authority": *Lapline v. Railroad and Steamship Co.*, 40 La. Ann. 661, 666. Such a doctrine, followed to its logical results, would deny a recovery for any injury, however directly occasioned by the negligence of the defendant, if the jury should find that the plaintiff would not have been injured had he been blessed with a robust constitution. And it is said: "If this doctrine has ever been recognized by any court, the sooner, in the interest of humanity, it is abandoned the better": Day, J., in *Allison v. Railroad Co.*, 42 Iowa, 274, 281. And see, to the same effect, *Brown v. Chicago etc. R. R. Co.*, 54 Wis. 342, 360; 41 Am. Rep. 41. The true rule, best supported by authority, is, that common carriers are bound to take notice of the fact that invalids frequently travel for the purpose of regaining health, or are impelled thereto by necessity, and the former must be held to a strict accountability for all injuries which result from a failure to exercise the highest degree of care: See *Allison v. Railroad Co.*, 42 Iowa, 274; *Stewart v. Ripon*, 38 Wis. 584; *Baltimore City Pass. R'y Co. v. Kemp*, 61 Md. 74; *Owens v. Railroad Co.*, 95 Mo. 169. Even the right of a conductor to put a trespasser off his train must be exercised with proper regard to the physical and mental condition of the person; and to eject him when he is in such physical or mental condition as that serious bodily harm may result from it is culpable negligence, and is actionable: *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624.

CINCINNATI, HAMILTON, AND DAYTON R. R. Co. v. McMULLEN.

[117 INDIANA, 439.]

JURISDICTION. — ACTIONS FOR DAMAGES FOR PERSONAL INJURIES, or for pecuniary loss resulting from the death of a person caused by the wrongful act, neglect, or default of another, are transitory in character, and arise out of the supposed violation of rights which, in legal contemplation, are neither local nor confined to the state where the right accrued.

JURISDICTION OF COURTS TO ENTERTAIN ACTIONS OR ENFORCE RIGHTS which accrued in a foreign state does not depend upon whether the right sought to be enforced was of statutory or of common-law origin, provided it accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy is sought.

NEGLIGENCE — MASTER AND SERVANT. — One who engages in service of railroad company is presumed to be acquainted with and to take upon himself all the ordinary risks incident to the service, including those arising from the negligent conduct of co-employees in whose selection and retention proper care has been exercised; and all those who are subject to the same general control, and are co-operating in the prosecution or accomplishment of the same general purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees.

IT IS DUTY OF RAILROAD COMPANY TO PROVIDE AND MAINTAIN REASONABLY SAFE AND SUITABLE CARS and other appliances for its employees to work with, and it cannot escape liability to an employee who, without fault or neglect on his part, sustains injury because of a negligent failure to discharge that duty, no matter to whom the company may have committed its performance.

MASTER AND SERVANT — FELLOW-SERVANTS. — Car-inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employee of a brakeman, or of one who is in the line of his service discharging the duties of brakeman, within the meaning of the common-law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant.

THERE IS NO LEGAL PRESUMPTION THAT IT IS DUTY OF CONDUCTOR of railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars, if the defect was such that it might have been discovered by inspection.

RAILROAD COMPANY — EVIDENCE. — Parol evidence is not admissible to prove that it was the duty of a freight-train conductor on the company's road to inspect and determine the condition of the couplings and brakes connected with his train, in the absence of any showing that such duty was not prescribed by some written or printed rules adopted and promulgated by the company.

RULES OF ANOTHER, SEPARATE, AND APPARENTLY INDEPENDENT RAILROAD COMPANY are not competent evidence to show the duties of freight conductors on the defendant company's road, until it is shown by some competent evidence that they had been adopted and promulgated as the rules of the defendant.

RAILROAD COMPANY — CIRCUMSTANTIAL EVIDENCE. — In an action against a railroad company for damages for negligently causing the death of the plaintiff's intestate, if, from all the facts and circumstances proved, the inference arises that the deceased was exercising due care, and that his death was caused while using a defective brake on one of the defendant's cars, a recovery is justified, although no direct evidence is given by witnesses of the accident.

PRACTICE — INSTRUCTION TO JURY. — In such a case, it is not the province of a court to say to a jury, as matter of law, what facts and circumstances were sufficient to show that the death of the plaintiff's intestate was caused by defective machinery.

PLEADING — JUDICIAL NOTICE. — For some purposes, courts of one state may take judicial notice of the judicial decisions of other states, but as matter of law or fact, applicable to a particular case, the law of another state, whether declared by judicial decisions or otherwise, must be pleaded or proved, and will not be judicially noticed.

R. D. Marshall and H. C. Fox, for the appellant.

C. H. Burchenal and J. L. Rupe, for the appellee.

MITCHELL, J. McMullen, as administrator of the estate of Stephen Wiggins, deceased, brought this action against the railroad company above named to recover the pecuniary loss resulting to the wife and children of the decedent, whose death is alleged to have been wrongfully caused by the neglect of the company.

It appears from the complaint that the intestate was a conductor on one of the railroad company's freight trains, and that his death was caused on the third day of February, 1885, in the city of Cincinnati, Ohio, by reason of the defective and dangerous condition of a brake on one of the company's cars.

A statute of the state of Ohio, giving a right of action, to be prosecuted in the name of the personal representative for the benefit of the wife or husband and children, whenever the death of a person has been caused by the wrongful act, neglect, or default of another, is incorporated in the complaint. This statute is in no material respect variant from the one covering the same subject as found in section 284 of the Revised Statutes of 1881.

An elaborate argument is submitted in support of the proposition that actions like the present, which were unknown to the common law, and are wholly of statutory origin, can only be maintained within the jurisdiction in which the right of action accrued. Hence it is contended, the injury and death having occurred in the state of Ohio, and the right of action, if any existed, having been given by the statute of that state,

that the courts of Indiana are without jurisdiction to enforce the statute of the former state.

Since the appeal was taken in the present case, this court has decided the question thus presented adversely to the view contended for by the appellant: *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169.

We arrived at the conclusion in the case cited that actions for the recovery of damages for personal injuries, or for pecuniary loss, are transitory in character, and arise out of the supposed violation of rights which, in legal contemplation, are neither local nor confined to the state where the right accrued. The further conclusion was arrived at, that, according to the weight of authority, as well as upon principle, the jurisdiction of courts to entertain actions, or enforce rights which accrued in a foreign state, did not depend upon whether the right sought to be enforced was of statutory or of common-law origin, provided the right accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy was sought. Adhering to the conclusions there stated, it follows that the action was well brought in the court below.

The plaintiff's case proceeded upon the theory that his intestate's death was caused by the negligence of the railroad company in allowing one of its cars, with a defective brake, to be put into a train at Richmond, Indiana, of which the intestate was put in charge as conductor.

There was evidence tending to show that the latter went upon the car in the company's yard at Cincinnati, the brakemen being necessarily otherwise engaged at the time, and while attempting to control the movement of the car by the use of the brake, the handle to that appliance suddenly gave way, or slipped off, thereby causing the decedent to lose his balance and fall between the moving cars, one of which passed over his body, crushing him to death.

The theory of the appellant company was, that if the intestate's death was occasioned by the negligence of any one, it was the fault of the car-inspector at Richmond, Indiana, where the train was made up, and that the car-inspector was a co-employee with the plaintiff's intestate. Hence, the insistence is, there can be no recovery, upon the principle that an employer is not liable to an employee for an injury occasioned by the negligence of a co-employee while both are engaged in a common service.

The instructions of the court relevant to that feature of the case were adverse to the appellant's view, and they are now made the subjects of complaint.

That one who engages in the service of a railroad company is presumed to be acquainted with and to take upon himself all the ordinary risks incident to the service, including the risks arising from the negligent conduct of co-employees in whose selection and retention proper care has been exercised, is too well settled to admit of further discussion. It is also a well-established rule that all those who are subject to the same general control, and are co-operating in the prosecution or accomplishment of the same general end and purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Id. 293; 50 Am. Rep. 798; *Gormley v. Ohio etc. R'y Co.*, 72 Ind. 31; *Brazil etc. Coal Co. v. Cain*, 98 Id. 282.

It is, however, the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with, and it cannot escape liability to an employee who, without fault or neglect on his part, suffers injury from the use of defective appliances or implements, by showing that the failure to discover and amend the defect was attributable to the neglect of an agent of the company to whom the duty of selecting and inspecting its cars and their appendages had been committed. An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skillful inspection and repair, as will keep the implements which employees are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary hazards: *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566, and cases cited.

Whoever is appointed or permitted to discharge duties which pertain to the station or function of employer must, upon the plainest principles of reason and justice, be held to stand as the representative of the employer, and in case injury results from his neglect, the latter must answer for his delinquency.

When the premise is conceded that the duty to furnish reasonably safe and proper instrumentalities for the performance of the work required rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employee who suffered injury therefrom.

It cannot be said that a car-inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is a co-employee of a brakeman, or of one who is in the line of his service discharging the duties of brakeman, within the meaning of the common-law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; *Fay v. Minneapolis etc. R'y Co.*, 30 Minn. 231; *Macy v. St. Paul etc. R. R. Co.*, 35 Id. 200; *Condon v. Missouri Pacific R'y Co.*, 78 Mo. 567; *Missouri etc. R'y Co. v. Dwyer*, 36 Kan. 58; *King v. Ohio etc. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 119; *Brann v. Chicago etc. R. R. Co.*, 53 Iowa, 595; 36 Am. Rep. 243.

After a careful examination of the authorities, the rule applicable to the point under consideration was well stated in *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, in the following language: "If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence."

As applied to the cars and instrumentalities furnished by the railroad company itself, the rule thus enunciated meets our approval.

In respect to cars received by one railroad company from another in the course of transportation, since the duty of the receiving company is to receive and forward the cars over its road, the rule above enunciated is not applicable in its strictness. In such a case, it may be said with much plausibility that it is not the duty of the company to furnish appliances

and instrumentalities, but to make proper inspection, and give notice of defects, if any are found, and that this duty is performed by the employment of a sufficient number of competent and skillful inspectors, who are subjected to proper rules and instructions. In cases of that class, it has been held that inspectors of cars and those acting as brakemen were fellow-servants within the common-law rule: *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456; *Keith v. New Haven etc. Co.*, 140 Mass. 175; *Smith v. Flint etc. R'y Co.*, 46 Mich. 258; 41 Am. Rep. 161; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318.

The suggestion is made that by the law of the state of Ohio, as declared by the courts of that state, car-inspectors and brakemen are co-employees, and that hence, under the rulings in that jurisdiction, no right of action arises in favor of the latter growing out of injuries caused by the negligence of the former.

It is a familiar principle that a cause of action cannot be asserted in one jurisdiction for a wrong or injury which occurred in a foreign state, unless an action might have been maintained in the jurisdiction where the injury occurred: *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169, and cases cited. We cannot, however, take judicial notice of the common law of the state of Ohio, or of any other foreign state. For some purposes, this court may take judicial notice of the judicial decisions of all the states; but as matters of law or fact applicable to a particular case, the law of a foreign state, whether declared by judicial decisions or otherwise, must be pleaded and proved. That was not done in the present case: *Bethell v. Bethell*, 92 Ind. 318; *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412.

The instructions complained of predicate the right of recovery upon the condition that the jury find the company negligent in the performance of its duty in the respects we have been considering, and upon the further condition that they find that the decedent was "himself free from fault and negligence in the use of such appliances."

The contention that, under the instructions complained of, the plaintiff was entitled to recover by showing that the railroad company or its agents were negligent, without showing that the decedent was exercising due care, is not well founded.

We agree that it was incumbent upon the plaintiff to aver

and prove the negligence of the railroad company, and the absence of contributory negligence on the part of the intestate, and that the burden of proof was upon the plaintiff upon both these propositions. An examination of the instructions demonstrates that the case was fairly put the jury upon that theory.

It is contended that the charge of the court relating to the measure of damages is much too broad. There is force in some of the objections thus urged; but while we do not approve of the instruction in the broad interpretation which might be given it, we are nevertheless constrained to hold that, taking it altogether, it was capable of such a construction as expressed the proper rule of damages, and that the amount assessed by the jury does not indicate that they were misled by the charge: *Louisville etc. R'y Co. v. Buck, supra*.

Complaint of a general character is made concerning the giving of other instructions by the court; but an examination of the charges complained of fails to disclose anything objectionable in them.

It was not error for the court to refuse to instruct the jury, as requested, to the effect that the decedent, being at the time he was injured the conductor of a freight train, and not under the immediate control of a superior, was therefore the representative of the company, and held to ordinary and reasonable care, not only in the management of the train, but in the inspection of the cars, machinery, brakes, and the like.

As is correctly stated in the head-note to *Ransier v. Minneapolis etc. R'y Co.*, 32 Minn. 331, there is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars, if the defect was such that it might have been discovered by inspection. This being so, the proposition involved in the instruction asked could not be stated as matter of law.

In like manner the court ruled correctly in refusing the fourteenth instruction asked by the appellant, which was to the effect that the mere fact that the deceased was found dead upon the defendant's railroad track, and that it was afterwards discovered that the brake-staff on one of the cars which was part of his train had no brake-wheel upon it, and that a brake-wheel was found near the deceased, was not sufficient to show that his death was caused by any defect in the brake-staff or wheel.

It was not the province of the court to say, as matter of law, what facts and circumstances were sufficient to show that the death of the intestate was caused by defective machinery. While it is true, as we have seen, that the burden was on the plaintiff to prove that the defendant was negligent, in that it supplied defective machinery, and that the intestate was free from fault contributing to his death, it was not necessary to make the proof by direct evidence.

The verdict will be upheld if these facts are made to affirmatively appear, either directly or circumstantially. If, from all the facts and circumstances proven in the case, the inference arises that the deceased was at the time exercising proper caution, and that his death was caused while he was using a defective brake on one of the appellant's cars, then a recovery was justified, even though there was no direct evidence given by persons who saw the deceased at the moment he fell under the car: *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279; *Burns v. Chicago etc. R'y Co.*, 69 Iowa, 450; *Jones v. New York Central etc. R. R. Co.*, 28 Hun, 364; 92 N. Y. 628.

It is only when the facts and circumstances surrounding the injury point neither one way nor the other that the plaintiff must fail for want of affirmative proof.

At the trial, the railroad company proposed to prove by a competent person that it was the duty of a freight conductor on its road to look at and determine the condition of the couplings, brakes, etc., connected with his train, and that he was held responsible for their condition. This testimony was properly excluded.

If there was any such rule or general direction as that proposed to be proved, it was presumably in writing. Such regulations are usually promulgated either by general rules, or orders issued by those having the control or management of the company's affairs. In the absence of any showing that the duties of freight conductors in the respects mentioned were not prescribed by some written or printed rules adopted and promulgated by those having the management of the company, the evidence was properly excluded.

For the same reason, the court ruled correctly in excluding parol evidence by which it was proposed to prove that the appellant company was, at the time of the injury complained of, under the management of another company, and that the printed rules of the latter company had been adopted by and extended over the appellant company.

We must presume, until the contrary appears, that if the two corporations were under one management, and the rules of the other corporation were adopted as the rules governing employees of the appellant, there was in existence some order, instruction, or resolution manifesting the facts. The rules of another separate and apparently independent railroad company were not competent evidence to show the duties of the freight conductors on the appellant's road, until it was shown, by some proper and competent evidence, that they had been adopted and promulgated as the rules of the appellant. Besides, the excluded rule which was offered in evidence is not set out in the bill of exceptions. It does not appear, therefore, that the appellant was harmed by the ruling of the court: *La Rose v. Logansport National Bank*, 102 Ind. 332.

The evidence tends to sustain the verdict. We have thus examined all the points made on behalf of the appellant, without regard to the motion made to dismiss the appeal. We find no error.

The judgment is affirmed, with costs.

JURISDICTION. — DEBTS HAVE NO LOCAL SITUS, and are suable in any country or locality where the debtor's person may be found: *East T. etc. R. R. Co. v. Kennedy*, 83 Ala. 462; 3 Am. St. Rep. 755. A state exercises jurisdiction over persons by bringing them before her courts, by action of her officers, or by notifying them generally to voluntarily appear, and this notice she has absolute power to give to persons within her borders, but not to persons outside her boundaries, and it is only against the former class that she can render a personal judgment: *Sturgis v. Fay*, 16 Ind. 429; 79 Am. Dec. 440; *Molyneux v. Seymour*, 30 Ga. 44; 76 Am. Dec. 662. Transitory actions may be prosecuted wherever the defendant is found, although the subject-matter thereof may have accrued in another state, and be regulated by the laws of that state: *Hale v. Lawrence*, 21 N. J. L. 714; 47 Am. Dec. 190.

MASTER AND SERVANT. — ASSUMPTIONS OF RISK INCIDENT TO EMPLOYMENT: See *Hosic v. Chicago etc. R. R. Co.*, 75 Iowa, 683; 9 Am. St. Rep. 518, and note; *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457, and note.

MASTER AND SERVANT — CO-EMPLOYEES. — WHO ARE AND WHO ARE NOT FELLOW-SERVANTS: *Stephens v. Hannibal etc. R'y Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note; *Fisk v. Cent. P. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and extended note 31, 32; *Krogg v. Atlanta etc. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79, and note 84.

MASTER AND SERVANT. — THE MASTER IS NOT ANSWERABLE for the negligence of another servant resulting in injury to his servant, where both servants are in the same common employment, and where the master is not guilty of personal negligence himself: *Fisk v. Central P. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note; *McMaster v. Illinois C. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note.

MASTER AND SERVANT. — THE MASTER MUST FURNISH SAFE APPLIANCES FOR HIS SERVANTS: *New York etc. Mining Co. v. Rogers*, 11 Col. 6; 7 Am. St. Rep. 198, and note 201. Compare *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note 450.

PAROL TESTIMONY. — Contents of a written instrument cannot be proven by parol evidence, unless failure to produce such instrument is accounted for: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627; 4 Am. St. Rep. 776; *Howard v. Britton*, 71 Tex. 286; *State v. Davis*, 117 Ind. 307.

RAILWAYS — NEGLIGENCE. — Plaintiff charging negligence on part of company or its employees has the burden of proving the omission of the duty incumbent upon the company: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; but evidence tending to show lack of precaution on the part of the company is sufficient to sustain a finding of negligence on part of such company: *Bolinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; 1 Am. St. Rep. 680.

RAILWAYS. — NEGLIGENCE, WHEN A QUESTION FOR THE COURT AND WHEN A QUESTION FOR THE JURY: *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457, and note; *Baltimore & O. R'y Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813.

EVIDENCE — JUDICIAL NOTICE. — The statute of another state must be introduced in evidence, for a court will not take judicial notice of it: *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Hale v. New Jersey etc. Co.*, 15 Conn. 539; 39 Am. Dec. 398; *Bufford v. Holliman*, 10 Tex. 560; 60 Am. Dec. 223; *Pelton v. Platner*, 13 Ohio, 209; 42 Am. Dec. 197; *Phillips v. Gregg*, 10 Watts, 158; 36 Am. Dec. 158; *Owen v. Boyle*, 15 Me. 147; 32 Am. Dec. 143; *Kohn v. Schooner Renaissance*, 5 La. Ann. 25; 52 Am. Dec. 577. But judicial notice is taken by the state courts of the laws of Congress: *Laidley v. Cummings*, 83 Ky. 606.

MERCER v. CORBIN.

[117 INDIANA, 450.]

ASSAULT AND BATTERY. — SOMETHING MORE THAN MERE NEGLIGENT TOUCHING OF PLAINTIFF'S PERSON is necessary to constitute an assault and battery. But there may be an actionable assault and battery, although there is no actual or specific intent to commit that offense.

MALICE AND CRIMINAL INTENT MAY BE INFERRED from recklessness and wanton disregard of human life.

ASSAULT AND BATTERY — WRONGFUL INTENT INFERRED. — Act of person in riding his bicycle against a pedestrian upon a town sidewalk, in such a rude and reckless manner as to show a disregard of consequences, is an actionable assault and battery, the intent being implied from the act.

BICYCLE IS A VEHICLE WITHIN THE MEANING OF THE LAW, and its use upon a public sidewalk is unlawful under Indiana Revised Statutes of 1881, section 3361, which makes it unlawful for any person to ride or drive upon a town or village sidewalk, and the rider of the bicycle may be held liable for an injury to a foot-man, although no injury was intended.

PRACTICE — BILL OF EXCEPTIONS. — PARTY WHO SEEKS REVERSAL OF JUDGMENT MUST BRING to the appellate court a record affirmatively showing a material error, since, in the absence of such showing, the presumption is in favor of the regularity of the rulings of the trial court. If all the evidence is not incorporated in the bill of exceptions, some statement must be made showing that it was excluded because deemed intrinsically incompetent.

S. Keith, J. S. Slick, L. Walker, and W. B. McClintic, for the appellant.

E. Calkins, G. W. Holman, W. McMahan, and J. L. Farrar, for the appellee.

ELLIOTT, C. J. The single count of the complaint charges that the appellant "assaulted, beat, and wounded the plaintiff." The answer is the general denial. The issue presented for trial, therefore, was, Did the appellant commit an assault and battery upon the person of the appellee?

The material facts embodied in the special verdict may be thus summarized: On the afternoon of the tenth day of May, 1884, the appellee was standing on a public sidewalk in the town of Rochester. He was standing near the outer edge of the pavement, facing the northeast, and the appellant, coming from the west, rode a bicycle against him, threw him down, and severely injured him. The sidewalk was fourteen feet in width, and there was nothing to obstruct the view or passage of the appellant.

The verdict states that the "defendant carelessly, recklessly, and rudely ran against and upon said Corbin."

If the appellant were charged with a tort based on mere negligence, the right of recovery would be perfectly clear, for there can be no doubt that the appellant was guilty of culpable negligence. The complaint, however, does not proceed upon the theory that the wrong was a mere negligent one, and we cannot sustain the recovery upon any other cause of action than that set forth in the complaint: *Feder v. Field*, 117 Ind. 386; *Palmer v. Chicago etc. R. R. Co.*, 112 Id. 250.

There must be something more than a mere negligent touching of a plaintiff's person in order to constitute an assault and battery. It is, however, not essential that there should be a direct or specific intention to commit an assault and battery at the time violence is done a plaintiff. The facts may be such as to create an implied or constructive intention to do a wrongful act, although there is no direct or specific unlawful intention: *Palmer v. Chicago etc. R. R.*

supra. In the case referred to we said: "The authorities, from the earliest years of the common law, recognize the rule that there may be a willful wrong without a direct design to do harm. The principle has been applied to furious driving, to collisions between vessels, to the taking of unruly animals into crowds, to carelessly laying out poison for rats, to want of caution towards drunken persons, and to the careless casting of logs and the like upon highways: 1 Hale's P. C., Am. ed., 475, and authorities, note 4; 4 Bla. Com. 182."

The question is fully and well discussed by Mr. Bishop, who says: "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not": 1 Bishop on Criminal Law, c. 20.

The principle we are asserting is strikingly illustrated in the old cases wherein it was affirmed that if a man carelessly casts a log from a window upon a much frequented way and kills another, his offense is murder in the second degree, but if the log is cast upon a highway not much traveled, the offense is manslaughter.

Mr. Addison applies the general principle to cases of assault and battery, saying: "An assault may be committed without any design or intention to commit an assault; for if the person of one man is violently struck by another, this is an assault; and it is no answer to say that it was done unintentionally, as, for instance, in endeavoring to strike some one else. So if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he is seated, the person thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault": 1 Addison on Torts, Wood's ed., 142.

In our own reports is found a very striking illustration of the principle we are discussing. In the case referred to, a man passing through a public park in the city of Indianapolis in the early morning aimed his pistol at a tree, drew the trigger, and killed a lad who was several hundred yards distant, and who was unseen at the time the pistol was discharged, and the court held that the accused was guilty of manslaughter: *Flinn v. State*, 24 Ind. 286.

In the case of *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81, a boy, in sport, but wantonly, threw a piece of mortar at another boy, and accidentally struck a third, and it was held that he had committed an assault and battery.

The defendant, in the case of *State v. Myers*, 19 Iowa, 517, recklessly discharged a pistol into a crowd, but without any intention to hurt any one, and a conviction for assault and battery was sustained.

In *Bullock v. Babcock*, 3 Wend. 391, a boy aimed at a basket, the arrow struck the plaintiff, and it was held that an action for assault and battery would lie.

It was held in *Commonwealth v. Lister*, 15 Phila. 405, that a man who fired a pistol intending to shoot through the floor of a Pullman car, but accidentally hit a by-stander, was rightly convicted of assault and battery.

These cases fully serve our purpose, for they sufficiently prove that there may be an actionable assault and battery, although there is no actual or specific intent to commit that offense. They are in truth no more than examples of the general rule everywhere prevailing, that from recklessness and wanton disregard of human life and safety, malice and criminal intent may be inferred: *Johnson v. McConnel*, 15 Hun, 293; *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267; *Vandenburgh v. Truax*, 4 Denio, 464; 47 Am. Dec. 268; *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55; *Morris v. Platt*, 32 Conn. 75; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; 17 Alb. L. J. 458; *Wright v. Clark*, 50 Vt. 130, 135; 28 Am. Rep. 496; *Regina v. Salmon*, 23 Alb. L. J. 1.

The specific facts stated in the verdict justify the finding of the jury that the act of the appellant was a rude and reckless one, and they also justify the legal conclusion that there was such a reckless disregard of consequences as to imply an intention to assault the appellee. They fully supply the grounds for inferring the constructive intent which makes a wrongful act willful or intentional. There was at least ten feet of the sidewalk entirely unobstructed, and the slightest regard for the safety of the appellee would have enabled the appellant to have avoided doing harm to him. There is no reason why the appellant might not, with the slightest care, have passed the appellee, and his failure to use this care implies a willingness to inflict the injury which he did in fact inflict upon the appellee. As the consequences of his wrongful and reckless disregard of the rights of others led to the injury, he must, under the familiar rule, be presumed to have intended that such consequences should result: *Peterson v. Haffner*, *supra*. If, therefore, it be conceded that the appellant had a right to ride his bicycle upon a way set apart

for the use of foot-men, he is nevertheless liable in this action.

Whether the appellant had a right to ride his bicycle upon the foot-way is a question which deserves consideration. This question would be important in the absence of any statute, and it is the more important because of our statute, which reads thus: "It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot-passengers by the side of any public highway in this state, unless in the necessary act of crossing the same": R. S. 1881, sec. 3361.

Sidewalks are intended for the use of pedestrians, and not for use by persons in vehicles. The manifest purpose of the statute is to preserve the sidewalks from use by persons in or on vehicles, and if a bicycle can be deemed a vehicle, then the appellant had no right to ride or drive his bicycle longitudinally along the sidewalk. If sidewalks are exclusively for the use of foot-men, then bicycles, if they are vehicles, must not be ridden along them, since to affirm that sidewalks are exclusively for the use of foot-men necessarily implies that they cannot be traveled by vehicles. It would be a palpable contradiction to affirm that foot-man have the exclusive right to use the sidewalks, and yet concede that persons not traveling as pedestrians may also rightfully use them. A person on a bicycle is certainly not a foot-man, and if not, then he makes an unlawful use of the sidewalk when he rides or drives his bicycle longitudinally along it. It would seem to follow that even if a bicycle cannot be considered to be a vehicle, still it is unlawful to ride or drive it along a way set apart for the exclusive use of pedestrians. We think, however, that a bicycle must be regarded as a vehicle within the meaning of the law.

Webster defines a bicycle as a "two-wheeled velocipede," and a velocipede is defined to be a "light carriage." Substantially the same definition is given by a law-writer: 2 Am. & Eng. Ency. of Law, 191.

Under these definitions it must be regarded as a sort of vehicle, and so the courts have regarded it. In one case, the title of which cannot now be recalled, it was held that a bicycle was entitled to the "rights of the road," as other vehicles, and a driver of a wagon, who refused to turn to the right, and thus caused a collision with a bicycle, was held

In *Taylor v. Goodwin*, L. R. 4 Q. B. D. 228, it was held that one riding on a bicycle may be convicted of furiously driving a carriage upon a highway under a statute forbidding such an act. In commenting on this case, Mr. Irving Browne says: "This of course would exclude bicycles from sidewalks, which is quite necessary": 24 Alb. L. J. 282.

If we are right in holding that the appellant, while riding his bicycle along the sidewalk, was engaged in the performance of an unlawful act, another important element is added to the appellee's case, making his right of recovery entirely clear; for a man who does an unlawful act is liable for the consequences, although they may not have been intended: *Peterson v. Haffner*, *supra*; *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 1; *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508; *Weick v. Lander*, 75 Ill. 93.

The appellant complains that testimony offered by him was erroneously excluded, but the evidence is not in the record, nor is there any statement that the rejected testimony was the only testimony that was given upon the subject. For anything that appears, the testimony may have been excluded because it was nothing more than a repetition of testimony already given by the witness. A party who seeks the reversal of a judgment must bring to this court a record affirmatively showing a material error, for, in the absence of such a showing, the presumption is in favor of the regularity of the rulings of the trial court. We do not mean to hold that where testimony is excluded it is always necessary to incorporate all the evidence in the bill of exceptions; but we do hold, that where all the evidence is not incorporated in the bill, some statement must be made showing that it was excluded because deemed intrinsically incompetent. We should be glad to encourage a practice that will abbreviate the records, and we think that in many cases, where questions arise on instructions, or on rulings in admitting or excluding evidence, statements may be embodied in the bill of exceptions which will obviate the necessity of bringing all the evidence into the record.

Judgment affirmed.

ASSAULT AND BATTERY. — WHERE A BOY THIRTEEN YEARS OLD, in sport, but wantonly, threw a piece of mortar at another boy, which accidentally hit a third boy and injured his eye, the boy was guilty of assault and battery: *Peterson v. Haffner*, 59 Ind. 130; 20 Am. Rep. 81. But one is not guilty of assault and battery for inflicting an unintentional injury, while in the exer-

cise of his right of self-defense, where neither negligence nor folly are proven against him: *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615. Where injuries result to a third person from a mutual combat between other parties, the latter are liable jointly and severally: *Murphy v. Wilson*, 44 Mo. 313; 100 Am. Dec. 290. An assault may be committed by a person who aims a gun in an excited manner at plaintiff, standing three or four rods off, and snaps it two or three times, even though such gun was unloaded, if such fact be unknown to plaintiff: *Beach v. Hancock*, 27 N. H. 233; 59 Am. Dec. 373. One who whips another at his own request, and for the purpose, as they both suppose, of saving him from greater punishment, is not guilty of assault and battery: *State v. Beck*, 1 Hill (S. C.) 363; 26 Am. Dec. 190.

CRIMINAL LAW. — MALICE IS OFTEN PRESUMED FROM PROVED OR ADMITTED FACTS, but such presumption is not necessarily conclusive: *Tiffany v. Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775, and note 780. Malice is implied from every deliberate and intentional homicide, when not accompanied with circumstances of extenuation: *State v. Shippey*, 10 Minn. 223; 88 Am. Dec. 70, and note 74; *State v. Moore*, 25 Iowa, 128; 95 Am. Dec. 776.

HIGHWAYS — BICYCLES. — Owners of bicycles or tricycles, or other non-horse vehicles, which, from its peculiar form and shape, or from the unusual manner of its use, frightens horses, or otherwise imperils passengers over a highway, or their property, have no right to use such vehicle on the highway, and the legislature may regulate the use of it: *State v. Yopp*, 97 N. C. 477; 2 Ann. St. Rep. 305.

APPELLATE PRACTICE. — ONE SEEKING A REVERSAL ON ACCOUNT OF ERROR must show such error affirmatively: *Mills etc. Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228, and note 230; *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 258; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525; 5 Am. St. Rep. 697, and note 699; *Jeffries v. Rudloff*, 73 Iowa, 60; 5 Am. St. Rep. 654, and note 657. If excluded evidence is not set out in the record, its exclusion will be assumed to have been proper: *Whittier v. Collins*, 15 R. I. 90; 2 Am. St. Rep. 879. Assignments of error may be too general, and when so, will not be reviewed on appeal: *Ackerman v. Huff*, 71 Tex. 317; *Land Co. v. Chisholm*, 71 Id. 523; *Houston v. Blythe*, 71 Id. 719; *Duncombe v. Powers*, 75 Iowa, 185. The appellate court will not entertain exceptions which are not assigned below, or do not appear in the record proper: *Patton v. Gash*, 99 N. C. 280; and errors for which a judgment is sought to be reversed must affirmatively appear in the record: *McVey v. Johnson*, 75 Iowa, 165. The admission of incompetent testimony, even against appellant's objection, is no ground for reversal, where the record does not show that exceptions were taken and preserved to the rulings of the court admitting the evidence: *Spelman v. Gill*, 75 Iowa, 717. Unless it be shown by the bill of exceptions what it is expected to prove in answer to the excluded question, the assigned error in excluding the question will not be considered: *McAuley v. Harris*, 71 Tex. 631. An appeal will not lie from an order which the record does not show was actually made: *Club v. Gorstline*, 73 Wis. 196. The rulings of the trial judge cannot be reversed, unless the bill of exceptions makes such showing of the facts and circumstances as will enable the appellate court to decide that he erred: *State v. Tiernan*, 40 La. Ann. 525. The appellate court has no jurisdiction of a cause in which the abstract fails to show that an appeal has been taken or attempted to be taken: *Donnelly v. Cedar County*, 75 Iowa, 536. Where the abstract does not show that an appeal was taken, the appellate court cannot entertain the case, except to dismiss it: *Names v. Names*, 74 Iowa, 213.

JOHNSON v. BARRETT.

[117 INDIANA, 551.]

SUBROGATION IS SUBSTITUTION OF ANOTHER PERSON IN PLACE OF CREDITOR, so that the person substituted will succeed to all the rights of the creditor having reference to the debt due him. It is independent of any merely contractual relations, and includes every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.

MORTGAGES — RIGHT OF SUBROGATION. — WHERE MORTGAGE IS EXECUTED TO RAISE MONEY TO DISCHARGE PRIOR ENCUMBRANCE, and the money is so applied, the mortgagee becomes entitled to be subrogated to the rights of the prior encumbrancer when necessary for the better security of his mortgage debt.

ONE REQUIRED TO PAY, AND WHO HAS ACCORDINGLY PAID, a mortgage executed by another, is entitled to be subrogated to the rights of the mortgagee, and to be treated as the assignee of the mortgage, notwithstanding the mortgage itself may have been canceled, and the mortgage debt discharged.

SUBROGATION TO RIGHTS OF PRIOR MORTGAGEE. — A mortgage was executed by husband and wife upon the former's real estate, after which the husband conveyed the same land to the wife, who died shortly after a judgment of foreclosure was rendered, leaving her husband and children surviving her. One J., at the husband's request, and upon his representation that his title was clear and complete, and without actual notice to the contrary, paid the amount of the judgment rendered upon the mortgage, and caused the judgment and decree of foreclosure to be receipted and released, and to be discharged of record, taking a new note and mortgage from the husband for the amount so advanced. Held, that upon ascertaining the facts, J. was entitled to have the satisfaction of the judgment set aside and vacated, and that justice required that he be subrogated to all the rights of the prior mortgagee, without regard to the solvency or insolvency of the mortgagor

W. P. Edson and E. D. Owen, for the appellant.

A. P. Hovey and G. V. Menzies, for the appellees.

NIBLACK, J. Complaint by James N. Johnson against George M. Barrett, Ollie G. Barrett, Nellie H. Barrett, Carl E. Barrett, Ellen Barrett, and Louisa Barrett, in four paragraphs.

The first two paragraphs sought to have a deed made by the defendant George M. Barrett to his wife, Mary L. Barrett, on the fourth day of January, 1882, for a tract of land in Posey County, set aside, on the ground that such deed was fraudulent and void as against the plaintiff.

The third paragraph sought to have the deed referred to declared and adjudged to have been only a mortgage.

The fourth paragraph charged that, on the eighteenth day

of January, 1881, George M. Barrett and Mary L. Barrett, his wife, executed to James A. Cooper a mortgage on a particularly described tract of land, being the same tract named in the preceding paragraphs, to secure the payment of the sum of \$3,000; that afterwards, on the fourth day of January, 1882, the said George M. Barrett conveyed the same land to his said wife, Mary Barrett, and caused the deed conveying the same to be duly recorded in the recorder's office of Posey County; that in January, 1884, Cooper obtained a judgment on the indebtedness which the mortgage was given to secure, for the sum of \$3,969, and a decree foreclosing the mortgage and ordering a sale of the mortgaged lands; that on the twenty-fourth day of February, 1884, the said Mary L. Barrett died intestate, leaving the said George M. Barrett as her husband, and the other defendants as her children, and all of them as her only heirs at law, surviving her; that the said George M. Barrett thereafter requested the plaintiff to pay off and discharge the judgment and decree of foreclosure rendered against him, as above stated, and to take from him a new note and another mortgage on the same land to secure the repayment of the amount which would be required to pay off and discharge such judgment and decree; that the plaintiff, in response to such request, proposed that if there was nothing against said land, except said judgment and decree of foreclosure, and his title to the land was good and perfect, he, the plaintiff, would pay off and discharge such judgment and decree, and take a new note and another mortgage; but that if anything had intervened since the execution of the mortgage to Cooper, which in any way might affect his, the said George M. Barrett's, title to the land, he, the plaintiff, would take an assignment of the judgment and decree; that the plaintiff, continuing, made diligent and particular inquiries of him, the said George M. Barrett, whether his title to the land was clear and complete, and whether any encumbrance other than the Cooper mortgage had been placed upon the land; that, in answer to these inquiries, the said George M. Barrett falsely, fraudulently, and corruptly assured the plaintiff that his title was clear and complete, and that there were no encumbrances subsequent to the execution of the Cooper mortgage; that, relying upon such assurances, and believing them to be true, the plaintiff did not make any further inquiry or examination as to the title of the land, and did not take an assignment of the judgment and decree in

favor of Cooper, as he would have otherwise done; that, for the same reason, he, the plaintiff, as he had contingently proposed to do, took a new note and another mortgage on the land included in the Cooper mortgage and the decree of foreclosure, to secure the payment of such note; that afterwards, on the first day of May, 1884, the plaintiff, in pursuance of his agreement with the said George M. Barrett, paid to Cooper the amount due upon his judgment and decree of foreclosure, including interest and costs, and caused such judgment and decree to be receipted and released, and to be discharged of record. Wherefore the plaintiff prayed that the release and satisfaction of the judgment and decree in favor of Cooper, entered of record as above set forth, should be set aside and vacated, and that he might be subrogated to all the rights which Cooper had held in such judgment and decree, upon his surrendering for cancellation the new note and subsequent mortgage executed to him by George M. Barrett.

A demurrer was sustained as to the first paragraph of the complaint, and the fourth paragraph was held to be insufficient upon demurrer as against all the defendants other than George M. Barrett, who were minors, and who appeared by a guardian *ad litem*. Upon the issues joined on the second and third paragraphs there was a finding and a judgment for the defendants.

The only question made in argument here is upon the sufficiency of the fourth paragraph of the complaint. The objections urged against the sufficiency of that paragraph are: 1. That, upon the facts alleged, George M. Barrett had no authority to enter into any contract concerning, or to execute to the plaintiff a mortgage upon, more than one third of the tract of land in controversy; and 2. That there was no allegation that George M. Barrett was insolvent, and that consequently the plaintiff had no other remedy against him than that of subrogation to the Cooper mortgage.

Subrogation is the substitution of another person in place of a creditor, so that the person substituted will succeed to all the rights of the creditor having reference to the debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.

Where a mortgage is executed to raise money to discharge a prior encumbrance, and the money is so applied, the mortgagee becomes entitled to be subrogated to the rights of the prior encumbrancer, when such a subrogation is made necessary for the better security of his mortgage debt: *Gilbert v. Gilbert*, 39 Iowa, 657.

When a person has been required to pay, and has accordingly paid, a mortgage executed by another, he is entitled to be subrogated to the rights of the mortgagee, and to be treated as the assignee of the mortgage, notwithstanding the mortgage itself may have been canceled and the mortgage debt discharged. In such a case, the payment of the mortgage debt will operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and the reasonable intent of the parties most interested. This right of subrogation does not depend upon the insolvency of the mortgagor. The mortgagee has the right to enforce or foreclose his mortgage, without regard to the solvency or insolvency of the mortgagor, and in that respect the person subrogated succeeds to all the rights of the mortgagee: *Sheldon on Subrogation*, secs. 1-4, 11-13, 24, 44.

The conveyance made by George M. Barrett to his wife was subject to all the equities which may have existed between him and her, as well as between him and his creditors, and also to the Cooper mortgage, which both had executed, and with the payment of which he was presumably chargeable: *Brookville National Bank v. Kimble*, 76 Ind. 195.

His relations to this mortgage were not changed by the death of his wife. While continuing to occupy these relations to the mortgage, he arranged to have it paid by the execution of a junior and partially ineffectual mortgage to the plaintiff on the same property. Justice, therefore, requires that the plaintiff shall be subrogated to the rights of Cooper in the mortgage of which his (the plaintiff's) money was applied in payment. This is especially so, as thereby no injustice will be inflicted upon the children of Mrs. Barrett. Such a subrogation will place them in no worse a condition than they occupied before the Cooper mortgage was discharged, and hence will afford them no just cause of complaint.

The case intended to be made by the paragraph of complaint under consideration would have been better stated if there had been a direct averment that the plaintiff had no actual knowledge of the existence of the conveyance from

George M. Barrett to his wife at the time he paid and discharged the Cooper mortgage; but the reasonable inference from what is alleged is, that he had no such knowledge, and that he failed to make that diligent inquiry which would have led to actual knowledge of such conveyance, on account of material and misleading representations made to him as charged.

The judgment is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

SUBROGATION. — The doctrine of subrogation includes all cases where a debtor must discharge his debt by payment to one not the original creditor: *Board of Supervisors etc v. Alford*, 65 Miss. 63; 7 Am. St. Rep. 637, and note; *Meher v. Cole*, 50 Ark. 361; 7 Am. St. Rep. 101; *Fears v. Albea*, 69 Tex. 437; 5 Am. St. Rep. 78; *Neely v. Jones*, 16 W. Va. 625; 37 Am. Rep. 794; *Chrisman's Adm'r v. Harman*, 29 Gratt. 494; 26 Am. Rep. 387; *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136; *Herron v. Marshall*, 5 Humph. 443; 42 Am. Dec. 444; *Hudgin v. Hudgin*, 6 Gratt. 320; 52 Am. Dec. 124; *Groves v. Steel*, 2 La. Ann. 480; 4 Am. Dec. 551; *Graham v. Campbell*, Meigs, 52; 33 Am. Dec. 126; and for rights of surety to subrogation, see notes to *Eddy v. Traver*, 31 Am. Dec. 264; *Pott v. Nathans*, 37 Id. 458; *Carter v. Jones*, 49 Id. 428.

SUBROGATION. — A STRANGER OR A MERE VOLUNTEER has no right to subrogation, but a privity of contract is not essential to support it: *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783, and note 789. But one secondarily liable is entitled, when he has paid the debt, to the benefit of any securities which the creditor may hold against the principal debtor: *Forest Oil Co.'s Appeal*, 118 Pa. St. 138; 4 Am. St. Rep. 584, and note 588.

SUBROGATION. — IF A PERSON ADVANCING MONEY TO PAY OFF A MORTGAGE, under agreement with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is still entitled to be subrogated to the rights of the mortgagee: *Fears v. Albea*, 69 Tex. 437; 5 Am. St. Rep. 78. It is only when the payment of encumbrances is necessary to protect the rights of the payor, or when they are paid in pursuance of an agreement with the debtor, that the payor can hold the encumbrances as security for the money advanced by him, that the payor will be subrogated to the rights of the holder of such liens: *White v. Cannon*, 125 Ill. 412; *Henson v. Reed*, 71 Tex. 726.

KELLER v. B. F. GOODRICH COMPANY.

[117 INDIANA, 556.]

TRADE-MARKS. — WHERE IT APPEARS THAT TRADE-MARK WAS USED TO SECURE BENEFIT TO USER at the expense of the owner, and that it was not simply used in good faith for the purpose of explanation or information, the just presumption is, that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose, and the courts will restrain such wrongful use.

WHERE SIMILITUDE IS IN SUBSTANTIAL PARTS OF TRADE-MARK, THERE IS INFRINGEMENT, and an evasive attempt to hide the similarity, or a colorable explanation which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-mark, will not defeat the owner's right to an injunction.

TRADE-MARK CONTAINING WORDS, "THE AKRON DENTAL RUBBER," IS INFRINGED by the use of a label containing the words, "Non-secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber," the last three words being prominently displayed in large type, and printed in different colored ink from the preceding words, and injunction will lie to restrain the infringement.

IN CONTENTION AS TO INFRINGEMENT OF TRADE-MARK, EVIDENCE AS TO QUALITY of the articles manufactured by the respective parties is immaterial.

TORT. — **INDEPENDENT TORT CANNOT BE MADE** a defense against another tort, either by way of set-off or counterclaim.

WITNESSES — RULE OF PROCEDURE IN CASE OF CONTEMPT. — Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness.

WITNESSES — ASSISTANCE OF COURTS IN SECURING TESTIMONY. — **ON PRINCIPLE OF COMITY,** courts of state where a deposition is taken to be used in another state will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions.

R. S. Robertson, for the appellant.

W. P. Breen, R. C. Bell, and S. L. Morris, for the appellee.

ELLIOTT, J. The appellee is and long has been engaged in the manufacture and sale of an article used in dentistry, and the trade-mark, printed upon each box or package, is "The Akron Dental Rubber." The appellant is engaged in the same line of business, and manufactures and sells an article which he claims is the same as that manufactured and sold by the appellee. He puts the articles in boxes of a different shape and material from those used by the appellee, and has printed on them these words: "Non-secret Dental Vulcanite, made according to our analysis of the Akron Dental Rub-

ber." The words preceding the words "Akron Dental Rubber" are printed in black ink and large type. The words "Akron Dental Rubber" are printed in red ink, the type is large, and the words are prominently displayed. They are so printed and arranged as to readily and quickly catch the eye. They are followed by the formula for the preparation of the article, also printed in red ink, but in very small type.

The contention of the appellee, which prevailed below, is that in using the words "Akron Dental Rubber" as the appellator, did he infringe its trade-mark; the appellant, on the other hand, contends that there was no infringement, because the label used by him does not assert that the article is the "Akron Dental Rubber," but informs the public that it is a non-secret vulcanite, manufactured according to an analysis of the "Akron Dental Rubber," and that the similarity is not such as is likely to mislead.

We should, perhaps, be able to sustain the views of the appellant's counsel, if it were not that the words constituting the appellee's trade-mark are printed in colors that attract attention at once, and are so prominently displayed as to catch and hold the eye.

What should be the rule where the use of a trade-mark is made by a rival in business of the owner of the mark for the simple purpose of apprising the public that his (the rival's) article is manufactured from the same formula as that used by the owner of the trade-mark, and this information is so given as to fairly indicate that the words are in good faith used solely for the purpose of imparting information, we need not inquire or decide; for we are satisfied that it must be adjudged that the appellant has not so used the words constituting the trade-mark of the appellee as to indicate that he employed them in good faith, and for the sole purpose of informing dealers that the article is prepared according to the formula used by the appellee. The manner in which the words that form the appellee's trade-mark are printed is such as to make them very conspicuous, thus indicating the purpose of the appellant to reap some advantage from the trade-mark, and not merely to impart information. If the object had been to impart information simply, it is evident that no such prominence would have been given those words. As a matter of law, the judgment must be that the words, as used and printed by the appellant, are likely to mislead dealers,

and that they indicate the purpose of the appellant to secure an advantage from the use of the words constituting the trade-mark. Adjudging, as we do, that this effect must be attributed to the mode of printing and displaying the trade-mark, we cannot avoid the conclusion that the appellant has invaded the rights of the appellee.

The words so prominently displayed are not simply words of similar sound and meaning as those chosen by the appellee, but they are the identical words. It is true that other words are associated with them, but the words of the trade-mark are so prominently displayed, arranged, and printed as to make it appear that they designate the article contained in the box or package, thus indicating that they were used for the purpose of conveying information as to the composition of the article manufactured by the appellant. The trade-mark is given the prominent position, and the other words are placed in subordinate ones. It is easy to perceive that the words "Akron Dental Rubber" might well be taken as designating the article sold by the appellant, and thus deceive purchasers. As we have shown, the purpose of the appellant in so conspicuously displaying the trade-mark adopted by his competitor was not to enable him to explain the method of manufacturing the product he offered for sale, and as this was not his purpose, the only reasonable hypothesis upon which his conduct can be accounted for is, that his purpose was to secure an advantage from the use of his rival's trade-mark. Either his purpose was to explain, or it was to wrong his competitor; it was not his purpose to explain, and therefore it must have been his purpose to do injury to his competitor.

As it was the purpose of the appellant to do wrong, it is the duty of the courts to prevent its accomplishment, since to do otherwise would be to permit a wrong-doer to secure an advantage from his own wrong. This conclusion, with all its necessary incidents, results when it is affirmed that this was the appellant's purpose, and if that was his purpose, he should not be permitted to persist in a course that may probably result in loss to his competitor or in the deception of others. Where it appears that a trade-mark is used for the purpose of securing a benefit at the expense of its owner, the person who uses it must be presumed, unless the contrary appears, to intend to deceive dealers, and if this intention does appear, or is to be presumed, it should be held that what is intended

will probably result. Where, therefore, it appears that the trade-mark was used to secure benefit to the user at the expense of the owner, and that it was not simply used in good faith for the purpose of explanation or information, the just presumption is, that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose. This being true, the courts should restrain him from persisting in his wrong.

It is difficult, if not impossible, to deduce any general rule from the decisions under which a particular case can be placed. As held by Mr. Justice Bradley in *Celluloid Mfg. Co. v. Cello-nite Mfg. Co.*, 32 Fed. Rep. 94, "each case must be determined on its own circumstances." It was held in that case that the defendant, by employing the words "Cellonite Manufacturing Company," infringed the trade-mark "Celluloid Manufacturing Company," the court saying, among other things, that "similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the labels are set forth, and an inspection of them clearly shows that the infringement was not so clearly apparent as in the case before us, yet it was held that the complainant was entitled to an injunction. There is one passage in the opinion in that case which so forcibly applies to the present that we quote it. "There is," said the lord chancellor, "a passage in the respondent's answer in which he says: 'There is no reason in the world why I should take the name, because I manufacture something superior, and at a cheaper price; therefore why should I take the name of the plaintiffs?' Well, then, one naturally asks, why should he do anything to lead people to suppose that his name is to be in any way associated with Glenfield, or this inferior article (as he says) with his?" So may we ask here, why should the appellant, doing business in Fort Wayne, Indiana, do anything to associate his name with Akron, in the state of Ohio? The natural presumption is, that he expected to derive benefit from it, and secure buyers from among those who had bought and used the Akron dental rubber. If we may assume, as we justly may, that he intended to mislead, and not in good faith to convey information, we

must carry this assumption to its logical consequences, and assert that his act was likely to accomplish what he intended it should.

The case from which we have quoted is approved and followed in *Johnston v. Ewing*, L. R. 7 App. C. 219, and of it the court said: "In the Glenfield Starch case (*Wotherspoon v. Currie*), the difference between the two labels was very obvious to the eye, even upon the most cursory inspection; and they were both intended for markets where the English language (in which they were throughout written) was understood. But the use of the characteristic word 'Glenfield' was enough for the purposes of deception."

The labels used by the opposing parties appear at full length in *Metcalf v. Brand*, 86 Ky. 331, 9 Am. St. Rep. 282; and the similarity between them was not so great as between the labels before us, yet an injunction was awarded. We collect and cite, without comment, other cases which support our conclusion: *Siebert v. Findlater*, L. R. 7 Ch. Div. 801; *McAndrew v. Bassett*, 10 Jur., N. S., 550; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185; *McCartney v. Garnhart*, 45 Mo. 593; 100 Am. Dec. 397; *Partridge v. Menck*, 2 Barb. Ch. 101.

We conclude this branch of the case by affirming that where the similitude is in the substantial parts of a trade-mark, there is an infringement; and that an evasive attempt to hide the similarity, or a colorable explanation which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-mark, will not defeat the owner's right to an injunction.

It is settled upon sound principle that an independent tort cannot be made a defense against another tort, either by way of set-off or counterclaim: *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254; *Terre Haute etc. R. R. Co. v. Pierce*, 95 Id. 496; *Sterne v. First National Bank*, 79 Id. 560; *Washburn v. Roberts*, 72 Id. 213; *Shelly v. Vanarsdoll*, 23 Id. 543; *Lovejoy v. Robinson*, 8 Id. 399; *Conner v. Winton*, 7 Id. 523. The decisions are harmonious, and they are right. The rule they declare supports the ruling of the trial court upon the appellant's counterclaim.

Corson, one of the witnesses for the appellee, after having testified that the article manufactured by the appellant was inferior to that manufactured by the appellee, was asked whether the formula from which it was prepared was not the

same as that used by the appellant, and he declined to answer, because to answer would be to reveal a trade secret. The appellant moved to suppress the entire deposition of the witness. The rule for which appellant contends would result in punishing the party, and not the witness, and the modern rule in analogous cases is not to make the party suffer, but to punish the contumacious witness: *State v. Thomas*, 111 Ind. 515, and authorities cited. We are not now prepared to assent to the views of appellant's counsel on this question of procedure; we are, on the contrary, inclined to the opinion that the rule of procedure is this: Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness. On the principle of comity, the courts of the state where a deposition is taken to be used in another state will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions. We doubt very much whether the witness was, in any event, bound to answer the question, since an answer would have disclosed a trade secret. A manufacturer who has discovered a method of preparing a valuable article has a property in his discovery, and to compel him to make known his process might entirely destroy the value of that property. There are authorities affirming that a witness is not bound to disclose the trade secrets; but we do not decide the question of their applicability, as we have concluded that the question arising on the denial of the appellant's motion may be otherwise disposed of, and the appeal be adjudged not maintainable. Our judgment on this point is, that the evidence as to the quality of the articles manufactured by the respective parties was not material, and if not material, its admission could not have harmed the appellant. It is not important which manufactures the better article; for if the trade-mark of the appellee was valuable to him, the appellant had no right to use it. Whether his article was superior or inferior is, therefore, immaterial. Its superiority, if conceded, would not entitle him to invade his competitor's rights by appropriating his trade-mark. On this point the authorities are well agreed.

Judgment affirmed.

TRADE-MARKS. — **TO CONSTITUTE A VIOLATION OF THE RIGHT OF PROPERTY IN A TRADE-MARK**, it is not necessary that the trade-mark itself should be imitated; any similitude such as will destroy the efficacy of the trade-mark is a violation of it: *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604.

TRADE-MARKS. — **THE GENERAL DOCTRINE OF TRADE-MARKS** is discussed in a note to *Partridge v. Menck*, 47 Am. Dec. 284-299.

TRADE-MARKS. — **THE USE OF DEFENDANT'S OWN NAME ON A SPURIOUS TRADE-MARK** is no defense to a bill for an injunction to restrain the piracy: *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676, and note 681.

CONTEMPT COMMITTED BY A WITNESS. — An order to punish a witness for a contempt in refusing to answer questions in proceedings supplementary to an execution before a referee may be made by a judge out of court: *Lathrop v. Clapp*, 40 N. Y. 328; 100 Am. Dec. 493.

COUNTERCLAIM. — A general discussion of this subject appears in the note to *Gregg v. James*, 12 Am. Dec. 152-157; note to *Woodruff v. Garner*, 89 Id. 482-489; note to *Andre v. Morris*, 7 Am. St. Rep. 658, 659. There can be no set-off when the claims are not mutual; a joint demand cannot be set off against a separate demand: *Ingols v. Plimpton*, 10 Col. 535. A defendant cannot avail himself in an action for a trespass upon land of a counterclaim for taxes paid by him thereon: *Davidson v. Roundtree*, 69 Wis. 655. In an action for damages for an assault and battery, the injury to the defendant which provoked the offense is not connected with the subject of the action, and cannot be pleaded as a counterclaim: *Ward v. Blackwood*, 48 Ark. 396. And an analogous case is *Christy v. Jones*, 39 Kan. 183, where, in an action before a justice of the peace to recover a balance due upon a book-account, the defendant filed an alleged set-off for damages to her crop by the stock of the plaintiff, such counterclaim, not arising from any contract express or implied, could not be pleaded as such. And in *Hopkins v. Stockdale*, 117 Pa. St. 365, it was held that a set-off by way of an open account or by a claim for unliquidated damages arising from the breach of an entirely independent contract was inadmissible to a *scire facias* to revive a judgment.

ENYEART v. KEPLER.

[118 INDIANA, 34.]

CONVEYANCE TO HUSBAND AND WIFE VESTS IN THEM an estate by the entireties in which neither can convey any interest without the assent of the other, unless their marital relation has been severed by divorce.

CONVEYANCE BY HUSBAND TO WIFE OF LANDS OF WHICH THEY ARE TENANTS BY THE ENTIRETIES is valid, and divests him of all estate in the land, and converts her estate into an estate in fee and in severalty. Her assent to such conveyance is sufficiently manifested by its acceptance by her, and her subsequent disposition of the property by will.

W. F. Medsker and C. E. Shiveley, for the appellant.

T. J. Study, for the appellees.

OLDS, J. This is an action to quiet title to real estate. The complaint alleges that the appellant, the plaintiff below,

is the owner in fee-simple and entitled to the possession of the following described real estate in the county of Wayne and state of Indiana, to wit: The north half of the northeast quarter of section 12, in township 16 north, of range 12 east, containing eighty acres more or less; that he acquired title to the real estate in the following manner, i. e.: On the twenty-third day of December, 1876, one Abiram Boyd, who was then and there the owner in fee of said lands, and in possession thereof, executed and delivered a deed, with covenants of warranty, conveying said lands to Martha Enyeart and William Enyeart, the plaintiff, who were then and there husband and wife; that afterwards, on the fifteenth day of December, 1880, and while the plaintiff and his said wife were owning and in possession of said real estate, the plaintiff executed and delivered to his said wife, Martha Enyeart, a quitclaim deed purporting to convey said real estate to his wife, in which deed his wife did not join; that on the eighth day of December, 1885, said Martha, while the wife of the plaintiff, departed this life, testate, at the county of Wayne and state of Indiana, at which time said Martha and plaintiff were occupying said land; that Martha devised the whole of said land to the defendants; that under the provisions of the will defendants are claiming an interest in said real estate adverse to the plaintiff, which claim is without right and unfounded, and a cloud upon the plaintiff's title; that the deed executed by the plaintiff to his wife is void and of no effect, and plaintiff takes the said real estate as surviving husband and widower of his deceased wife, Martha Enyeart. Prayer for judgment quieting title.

Appellees demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. Plaintiff refused to amend, and the court rendered judgment upon demurrer for appellees. The ruling of the court in sustaining the demurrer to the complaint is assigned as error.

The conveyance of the land by Abiram Boyd, who owned the same in fee-simple, to William B. and Martha Enyeart, husband and wife, vested the title in them by entirety. It is insisted by counsel for the appellant that the quitclaim deed by appellant to his wife was void for the reason that the husband had no such interest in the land as he could convey to the wife; that an estate vested in the husband and wife by entirety cannot be conveyed by the husband without the wife

joining in the deed, and that a deed direct from the husband to the wife is void, and passes no title, and the husband, as survivor, takes the whole title.

The rule in regard to estates by entirety is, that neither tenant can sever the union of interest without the consent of the other; but this is construed to mean that the one cannot sever the interest or make any disposition of the estate so as to affect the right of survivorship. In the case of *Washburn v. Burns*, 34 N. J. L. 18, the court, in speaking of the husband's rights in an estate by entirety, says: "The limit of this right of the husband is, that he cannot do any act to the prejudice of the ulterior rights of the wife": 1 Bishop on Married Women, sec. 622; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269. There is a discrepancy in the authority as to the right of the husband to convey or encumber his interest in the estate without the assent of the wife, and as to whether or not the interest of the husband is liable to sale on execution against him, some authorities holding that he may convey or encumber his interest by deed without the assent of the wife, and that his interest is subject to sale on execution, and that such deed or sale passes all the title of the husband in the land, and in case the husband survives the wife, the purchaser takes the fee in the land; but by a long line of decisions in our own state, it is held that the husband cannot convey or encumber his interest in the land without the assent of the wife, and that his interest is not subject to sale on execution.

1 Washburn on Real Property, 5th ed., page 706, section 2, in treating of estates by entirety, says: "In such case, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; so that if, for instance, the wife survive, and then dies, her heirs would take to the exclusion of the heirs of the husband."

It is the prevailing doctrine that a severance of the marital relation by divorce also severs the estate, and after divorce they no longer hold by entirety, but as joint tenants, or tenants in common, owing to the different policies and laws of the states: 2 Bishop on Marriage and Divorce, 6th ed., sec. 716; *Harrer v. Wallner*, 80 Ill. 197. It may be regarded as settled by the weight of authority that the husband's interest in the real estate is vested in him by the deed; that on the death of the wife, the estate is simply freed from participation by her. The husband and wife are each seised of the whole

estate, and, under the decisions of this state, they have equal rights to the possession, the survivor taking the whole estate upon the death of his co-tenant. It follows, therefore, that the husband, the appellant in this case, at the time he executed the quitclaim deed to his wife, had an interest in the real estate; that he was seised of the whole estate by a title which would descend to his heirs, subject only to be defeated by the wife surviving him, in which event she would take the whole of the estate.

It remains then to be determined whether the husband can convey such title as he has in the real estate to the wife by deed direct from him to his wife.

In the case of *Dodge v. Kinzy*, 101 Ind. 102, the court collects the authorities on this question, and holds that a mortgage executed by the husband and wife on an estate held by entirety securing the individual debt of the husband is void both as to the husband and wife. That decision is based upon the theory that the law of this state prohibits and makes void the contract of the wife encumbering her real estate as security for the debt of the husband, and the mortgage being void as to the wife, it had no greater force than if executed by the husband without the wife joining. The former decisions of this court being to the effect that the husband could not encumber or convey said estate without the assent of the wife, her void act in joining in the mortgage did not operate as an assent on the part of the wife, hence the mortgage was void as to both.

No disabilities attach to the husband to affect his conveyance of real estate. He can receive and convey title just the same as if he were unmarried, except that he cannot dispose of or in any manner affect the inchoate right of his wife in and to his real estate. The decisions of this court only go so far in regard to estates by entireties as to hold that the husband cannot convey or encumber the estate without the assent of the wife; upon the contrary, it is manifestly true that he can convey and encumber said estate by and with the assent of the wife by her joining in the deed, except in case of a mortgage or encumbrance of suretyship on the part of the wife, her contract of suretyship being absolutely void.

By the laws of this state, and the decisions of this court, the husband may convey his interest in real estate held in any other manner than by entirety, and may convey such interest by and with the assent of the wife, unless the assent

of the wife be given to secure the debt of the husband. In the case of suretyship she is prohibited from giving her assent, and if given, it is void and of no effect. There is no inhibition on the wife's right to receive title to real estate. This being the *status* of the parties, we can see no good reason why the husband cannot convey title to real estate to the wife, and the wife receive title from him. The decisions of the court only go to the effect that the husband cannot convey his interest in an estate by entirety without the assent of the wife. In the case of a conveyance by the husband to the wife of his interest, and her acceptance of the deed, it operates as a relinquishment of the husband's right as survivor.

As in this case the husband conveys the real estate in question to the wife, and she accepts the deed, and afterwards disposes of the real estate by will, this would constitute such an assent on the part of the wife within the meaning of the decisions of this court as would make the deed valid and pass the title to the wife; if, indeed, it can be said in case of a conveyance of the husband's interest to the wife any assent is necessary more than the acceptance of the deed, as such a conveyance does not attempt to take from, but rather add to, her interest in the land.

By some of the early decisions of this court it was held that a deed direct from husband to wife was void in law, but would be upheld in equity. In the discussion of the validity of a deed direct from the husband to the wife, in the case of *Thompson v. Mills*, 39 Ind. 528, we think the court laid down the proper doctrine. The court in that case says: "As the fact is recognized that the husband may, by deed, made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties, that is, hold them valid until some legal reason has been shown for setting them aside?"

The deed from appellant to his wife was valid, and passed all the interest the husband had in the land to his wife. Suppose the husband and wife should have joined in a deed and conveyed the land to a third person, and such third person conveyed the land to the wife, the legal title would have passed from the husband and wife and been received back by the wife. If they could convey title in that manner, as they surely could have done, there is no sound reason why, under our laws, they could not by agreement pass the title by deed

direct from the husband to the wife, he executing and she accepting the conveyance. Such a deed is valid unless attacked for some cause other than that they were husband and wife at the time of the execution of such conveyance.

There was no error in the ruling of the court sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

HUSBAND AND WIFE — ESTATE BY ENTIRETIES. — This estate is the subject of an exhaustive note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389. Under a conveyance to a husband and his wife, they are seised of an estate by entireties, and do not take distinct moieties as joint tenants: *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117; *Needham v. Branson*, 5 Ired. 426; 44 Am. Dec. 45; *Gibson v. Zimmerman*, 12 Mo. 381; 51 Am. Dec. 168; *Hulett v. Inlow*, 57 Ired. 412; 26 Am. Rep. 64; *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 372; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425; and this is the same rule as that which prevails at common law: *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; nor is this common-law rule changed by the statutes of Indiana: *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; nor by the statutes of Illinois: *Lux v. Hoft*, 47 Ill. 425; 95 Am. Dec. 502; nor by the statutes of Missouri: *Gibson v. Zimmerman*, 12 Mo. 381; 51 Am. Dec. 168; nor by the statutes of Mississippi: *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425; nor by the statutes of New York: *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; nor by the statutes of Maryland: *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266; nor by the statutes of New Jersey: *Buttler v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52; and see note to *Hemingway v. Scales*, 97 Am. Dec. 428, for the effect of statutes upon the common law. But in Ohio, if a devise is made to a man and his wife, they will take as tenants in common, and not by entireties: *Sergent v. Steinberger*, 2 Ohio, 305; 15 Am. Dec. 553; *Farmers' etc. Bank v. Wallace*, 45 Ohio St. 152.

SURVIVORS. — In estates by entireties, the whole estate goes to the survivor: *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371; *Smith v. Smith*, 23 Wis. 176; 99 Am. Dec. 153; *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117; *Needham v. Branson*, 5 Ired. 426; 44 Am. Dec. 45; *Gibson v. Zimmerman*, 12 Mo. 381; 51 Am. Dec. 168; even as against the creditors of the deceased tenant, who had levied upon the property during his or her lifetime: *Brownson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517; *Simpson v. Pearson*, 31 Ired. 1; 99 Am. Dec. 577; *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471. But it has been held that the husband's interest in an estate by entireties, or at least his life estate therein, except such part as may be exempt under the ordinary homestead provisions, is subject to sale on execution for his debts, and the purchaser thereof at an execution sale will acquire a right to the use of the husband's interest during such husband's life: *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692. And it has been also held that the husband having the right of possession and control of an estate granted to himself and wife may demise, alien, or mortgage his interest therein during his own life, but only in such a manner as not to prejudice

the wife's right to the whole in case of her surviving him: *Wyckoff v. Gardner*, 20 N. J. L. 556; 45 Am. Dec. 388; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49, and note 55; *Needham v. Branson*, 5 Ired. 426; 44 Am. Dec. 45; note to *Beard v. Knox*, 63 Am. Dec. 128; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269.

ALIENATION. — In estates by entireties, neither tenant can alien any part of the property so held by them without the assent of the other tenant: *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Wyckoff v. Gardner*, 20 N. J. L. 556; 45 Am. Dec. 388; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692, and note 696; *Smith v. Smith*, 23 Wis. 176; 99 Am. Dec. 153; *Den v. Hardenberg*, 10 N. J. L. 42; 18 Am. Dec. 371.

VENEMAN v. JONES.

[118 INDIANA. 41.]

ORDINANCE OF MUNICIPAL CORPORATION AUTHORIZING THE DEPOT-MARSHAL TO PRESCRIBE THE PLACES where omnibuses, hacks, and other vehicles shall stand at the railroad depot, and requiring drivers to obey the directions of police-officers in regard to such places, is valid.

ARREST, WHEN AUTHORIZED. — If officers, even though unknown as such to the common law, are expressly authorized by statute or municipal ordinance to conserve the peace, they have all the common-law authority of constables or peace-officers, and may, without warrant, apprehend and take into custody those who violate such law or ordinance in their presence.

ONE IS NOT LIABLE FOR AN ARREST BECAUSE HE DIRECTS THE ATTENTION OF THE OFFICER to what he supposes to be a breach of the peace, and the officer, without any other direction, on his own responsibility, arrests the offender for what he supposes to be an offense committed in his presence.

PRIVATE PERSON IS LIABLE FOR ARREST AND FALSE IMPRISONMENT IF HE INDUCES AN OFFICER TO ARREST ANOTHER without a warrant, and without an offense having been committed in view of the officer, unless he justifies by showing that his charge was well founded.

C. L. Wedding, for the appellant.

J. E. Williamson, for the appellee.

MITCHELL, J. Jones complained of Veneman, and charged that the latter wrongfully caused the plaintiff to be arrested and falsely imprisoned by a police-officer in the city of Evansville, by representing to the officer that he had violated certain ordinances of the city, and by demanding of the officer that he arrest the plaintiff. It is charged that after causing him to be arrested and imprisoned, the defendant failed and refused to prefer any charge against the plaintiff, but that he was discharged without any accusation having been lodged against him.

The defendant answered, in substance, that at and prior to the date of the arrest, there was in force in the city of Evansville a certain ordinance which authorized the depot-marshal, or any police-officer of the city, to prescribe or designate the place where hacks, coaches, omnibuses, and other vehicles should stand while waiting for passengers at the railroad depot, and which prescribed certain penalties to which hackmen and others were liable who refused to conform to the directions of the officers named in the respects mentioned. It is averred that prior to the date of the arrest complained of the proper officers, in obedience to the command of the ordinance, had designated certain space near the depot which was to be occupied by omnibuses, and certain other space for hacks, cabs, and the like, and that the defendant was the owner of two omnibuses, and had certain space assigned him by the officers, which he was entitled to occupy with his horses and vehicles, and that on the day of the arrest complained of the plaintiff placed his cab on the space assigned to omnibuses, and thereby excluded the defendant's omnibus from the place assigned it. It is further averred that this was done in the presence of William McFarland, a police-officer of the city, who requested the plaintiff to move his cab out of the position it then occupied, which the plaintiff refused to do, but persisted in remaining in the place assigned to omnibuses, in violation of the city ordinance, for which violation so committed the officer above named arrested him, and that this was the same arrest complained of by the plaintiff in his complaint. The court sustained a demurrer to the answer, and the propriety of this ruling is the only question involved in this appeal.

There is no brief for the appellee, and we are hence without information as to the theory upon which the court proceeded in holding the answer insufficient.

There can be no question but that the ordinance authorizing the depot-marshal to prescribe the places where omnibuses, hacks, and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police-officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the municipal authorities had the power to pass: *City of St. Paul v. Smith*, 27 Minn. 364; *Commonwealth v. Robertson*, 5 Cush. 438; *Commonwealth v. Stodder*, 2 Id. 562; 98 Am. Dec. 679; *Horr and Bemis on Municipal Ordinances*, sec. 247.

Such regulations tend to the convenience of the general public by protecting persons from the annoying solicitations of hackmen and others, who, when acting without restraint, often confuse travelers, besides engendering strife and contention among themselves.

The ordinance being valid, it only remains that we inquire whether or not the defendant, whose privileges were being confessedly infringed by its violation, was justified in representing the fact to the police-officer, and whether the officer whose authority was defied was justified in making the arrest, the plaintiff, as is confessed by the demurrer to the answer, being at the time in the persistent violation of the ordinance.

Among other things, the ordinance commands the depot-marshal, or in his absence his deputy or any member of the police force, to maintain order at the depot, and arrest and take before the recorder for examination any person who, in his view or cognizance, violates any of the provisions of the ordinance.

By the common law, so far as we are advised, such officers as depot-marshals or policemen were unknown as conservators of the peace. But where officers, even though unknown as such to the common law, are expressly authorized by statute, or by a municipal ordinance duly enacted, to conserve the peace, they have all the common-law authority of constables or peace-officers, and may apprehend and take into custody those who violate the law or ordinances of a city in their presence without warrant: *Wiltse v. Holt*, 95 Ind. 469, and cases cited; *State v. Freeman*, 86 N. C. 683; *Beville v. State*, 16 Tex. App. 70; *State v. Holcomb*, 86 Mo. 371; 7 Am. & Eng. Ency. of Law, 675, 676.

To hold that officers charged with preserving the peace of a city, and who are especially commanded to arrest those who violate its ordinances within their view or cognizance, are nevertheless without power to that end without a formal warrant, and that one whose personal rights are being defiantly invaded in violation of an ordinance may not invoke the aid of a peace-officer who is near by would effectually tie the hands of the officers, and compel others either to submit to the turbulent and lawless or maintain their rights as best they may.

It is to be observed that this is not an action against the officer for making a false arrest, nor is it charged that the defendant arrested and falsely imprisoned the plaintiff. The

charge is, that the defendant incited or induced the officer to arrest the plaintiff, by representing that he was violating a city ordinance, and by demanding of the officer that he arrest the plaintiff. The defendant justifies by answering that the plaintiff was, at the time of his arrest, actually violating a city ordinance, in the view and presence of the officer who made the arrest. This presents a complete justification.

If one directs the attention of an officer to what he supposes to be a breach of the peace, and the officer, without other direction, arrests the offender on his own responsibility for what he assumes to be an offense committed in his presence, the person who did nothing more than to communicate the facts to the officer is not liable for false imprisonment, even though the arrest was unlawful: *Taaffe v. Slevin*, 11 Mo. App. 507; *Lark v. Band*, 4 Id. 186. Thus where a policeman made an arrest upon an unfounded charge preferred by a third person, and not committed in the presence of the officer, Lord Denman said: "If the defendant directed the police-officer to take the plaintiff into custody, he is liable in the present action for false imprisonment; but if he merely made his statement to the constable, leaving it with the constable to act or not, as he thought proper, . . . then the defendant will not be liable, at least in this form of action": *Hopkins v. Crowe*, 7 Car. & P. 373.

One who merely states to an officer what he knows of a supposed offense, even though he expresses the opinion that there is ground for an arrest, "but without making any charge or requesting an arrest, does not thereby make himself liable in an action for illegal arrest": *Burns v. Erben*, 1 Robt. 555.

Where, however, a private person induces an officer to arrest another without a warrant, and without an offense having been committed in the view of the officer, he will be liable for false imprisonment unless he justify by showing that the charge was well founded: *Taaffe v. Slevin*, 11 Mo. App. 507; *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608; *McGarrahan v. Lavers*, 15 R. I. 302; *Collett v. Foster*, 2 Hurl. & N. 356; *Griffin v. Coleman*, 4 Id. 265; Cooley on Torts, 2d ed., 202.

The answer in the present case was good for two reasons: 1. Because it shows that the plaintiff was arrested for violating an ordinance of the city of Evansville, and that the charge upon which he was arrested was well founded; 2. Because it distinctly charges that the arrest was made by a

police-officer for an offense alleged to have been committed in the view and presence of the officer, whose duty it was to make the arrest. If either hypothesis be proved, the appellant is not liable. If the latter is proved, he is not liable, even though the charge was not well founded.

The judgment is reversed, with costs.

ARREST WITHOUT A WARRANT. — In Illinois, conservators of the peace are authorized to arrest without warrant for offenses committed in their presence; but if they arrest under other circumstances, they do so at their peril, and must take the responsibility of showing that the prisoner has been guilty of a crime: *Leighton v. Hall*, 31 Ill. 108; 83 Am. Dec. 205. But though an arrest without a warrant is justifiable, yet to detain the prisoner longer than a reasonable time for suing out a warrant, then to handcuff him, carry him out of the county, and then incarcerate him for days under no warrant whatever, is false imprisonment, and the finding of the jury for twenty-five dollars damages is no compensation for such an injury: *Potter v. Swindle*, 77 Ga. 419.

ARREST WITHOUT A WARRANT, WHEN JUSTIFIED: Note to *Ross v. Leggett*, 1 Am. St. Rep. 616; note to *Eanes v. State*, 44 Am. Dec. 292-294; note to *Mitchell v. State*, 54 Id. 268; note to *Roberts v. State*, 55 Id. 104.

WRONGFUL ARREST, WHO LIABLE THEREFOR: Note to *Bissell v. Gold*, 19 Am. Dec. 490-493; note to *Mitchell v. State*, 54 Id. 263-268.

MITCHELL v. WEAVER.

[118 INDIANA, 55.]

IF A JUDGMENT IS REFORMED SO AS TO MAKE IT FOR A LESS SUM THAN THAT FOR WHICH IT WAS FIRST ENTERED, the judgment creditor becomes liable to an action for the difference between the two amounts, if he has bid off land at a sheriff's sale under such judgment for the full amount for which it was originally entered, and, after its reformation, has taken out a deed, and thereby elected that the sale should stand as made.

J. H. Jordan and O. Matthews, for the appellant.

W. R. Harrison, G. A. Adams, and J. S. Newby, for the appellee.

ELLIOTT, C. J. It is alleged in the complaint of the appellee that on the eighteenth day of April, 1881, Abraham Weaver was the owner of a tract of land; that he mortgaged it on that day to Samuel M. Mitchell to secure a debt of \$6,500; that he agreed with the appellee, in consideration that she would join with him in the mortgage, to convey the land to her, subject to the mortgage; that he did convey the land to

her on the twenty-first day of April, 1881; that the deed executed on that day was lost; that on the seventeenth day of November, 1885, he executed to her a deed in lieu of the one which had been lost, and that this last deed was recorded; that on the twenty-ninth day of November, 1884, Mitchell instituted a suit to foreclose his mortgage, and secured a judgment for \$8,461, and a decree of foreclosure; that on the third day of January, 1885, the land was sold upon the decree; that Mitchell bid for it \$8,638.76, and received a certificate from the sheriff; that Mitchell paid the sheriff \$173.67, the costs of the suit and sale, and receipted to him for the remainder of the judgment; that on the sixteenth day of February, 1885, Abraham Weaver and others filed a complaint to correct the judgment; that notwithstanding the fact that Mitchell had notice of the filing of that complaint, and that the judgment was rendered for \$760 more than was owing him, he demanded and procured from the sheriff, on the third day of January, 1886, a deed for the mortgaged premises, and by virtue of the deed asserts title to the land and claims possession, although he knew that it had been conveyed to the appellee; that Mitchell has never paid any part of his bid except \$173.67, and that the appellee has demanded of him the sum of \$744.17, which he refuses to pay; that on the seventeenth day of February, 1886, an order was duly entered correcting and reforming the judgment rendered in favor of Mitchell, and it was adjudged that the judgment entered in his favor exceeded the amount due him in the sum of \$744.17. It is also alleged that the land embraced in the mortgage was of the value of \$12,000. To this complaint Mitchell unsuccessful demurred.

The decision of the trial court reforming the original judgment is conclusive as against any collateral attack, and is of course conclusive here, but it does not adjudicate the issue joined in this case. The issue here is, whether the appellee has a right to a judgment for money against the appellant, and not whether the original judgment was wrong.

The appellee can only recover upon the cause of action stated in the complaint, and in accordance with the theory on which it proceeds: *Feder v. Field*, 117 Ind. 386; *Moorman v. Wood*, 117 Id. 144; *Mescall v. Tully*, 91 Id. 96. The question, therefore, is not what relief the appellee may have, but whether she can secure any relief under the complaint as it is constructed: *Palmer v. Chicago etc. R. R. Co.*, 112 Id. 250;

Supreme Lodge etc. v. Knight, 117 Ind. 489. The only relief, if any, which she can be awarded, under the theory adopted and the remedy chosen, is a judgment for damages, and if she is not entitled to that relief, the complaint is bad.

In order to entitle her to recover damages, it must appear that the appellant, Mitchell, has committed an actionable wrong by violating an express or an implied contract.

There was no express contract between the parties. Mitchell did not promise to pay the appellee any money, or to do any act. If, therefore, there is no implied contract, there can be no recovery, and the question is, Was there an implied contract? We think that the facts stated in the complaint are such as authorize the conclusion that there was such a contract. The appellant bid a specified sum for the land; he demanded and received a deed after notice of the filing of the complaint to reform the judgment, and he asserts title under his deed to land which he knew was owned by the appellee, and is of the value of twelve thousand dollars. Upon the facts confessed by the demurrer, he cannot hold the land without paying the amount of his bid, for the amount in excess of his judgment belongs to the owner of the land. As he has elected to hold the land, and the appellee has elected to part with title and hold him to his bid, equity requires that he should pay it. She is doubtless estopped by her conduct from asserting any title, and he will therefore acquire a perfect title when he pays the full amount he bid for the land. The complaint does not present the question of the appellant's right to treat the sale as voidable, for he confesses that he has affirmed it, and asserts title under it. As he affirms the sale, and the appellee holds him to his affirmance, he cannot escape the payment of his bid. He cannot claim title and yet refuse to pay what he promised. He must do one thing or the other,—repudiate the sale or pay the full amount of his bid. He did not pay it, for he simply receipted to the sheriff, and as he receipted for \$744 more than his judgment amounted to, he has in his hands that much more money than he is entitled to, and must pay it to the person whose land he has secured. If the owner had repudiated the sale instead of affirming it, then a very different question would be presented.

We hold the complaint good.

The evidence makes a stronger case than the complaint, and as the complaint is good, the finding must be right.

Judgment affirmed.

EFFECT OF A REVERSAL OF A JUDGMENT. — If a judgment is reversed, the losing party will be restored to all that he has lost by the operation of the judgment: *Martin v. Woodruff*, 2 Ind. 239; *Abbatt v. Crocker*, 2 Id. 575; but where property taken under a judgment, of which restitution is sought, has by voluntary or judicial sale against the successful party passed into innocent hands, the interests of the *bona fide* purchaser will be protected: *Hanschid v. Stafford*, 27 Iowa, 301; though a purchase at execution sale by a plaintiff in execution, with knowledge of an appeal pending, does not make him a *bona fide* purchaser, and his purchase is at his peril, subject to the result of a change in the judgment on appeal: *Twogood v. Franklin*, 27 Id. 239. See the case of *Gerecke v. Campbell*, 24 Neb. 306, where it was held that money paid by the execution defendant on an execution, although irregular and voidable, issued on a dormant judgment, was a voluntary payment, and not recoverable back.

EX PARTE GRIFFITHS.

[118 INDIANA, 83.]

CONSTITUTIONAL LAW—NO FUNCTIONS CAN BE IMPOSED ON JUDGES NOT OF A JUDICIAL NATURE. — The legislature cannot exact ministerial duties of the judges of the supreme court, nor add duties to those devolved on them by the constitution.

CONSTITUTIONAL LAW.—STATUTE REQUIRING JUDGES OF THE SUPREME COURT TO PREPARE SYLLABI of their decisions is unconstitutional and void.

L. T. Michener, attorney-general, W. F. Browder, A. F. Potts, and V. G. Clifford, for the petitioner.

ELLIOTT, C. J. The reporter of the decisions of this court files this petition invoking judgment upon the validity of the act of March, 1889. Among other provisions, that act contains the following: "Opinions involving no disputed principles of law or equity or rule of practice, and no question except as to whether the verdict or decision is sustained by sufficient evidence, or is contrary to the evidence, shall be printed in brier type, without analysis or *syllabus*. . . . The index and tables of cases shall be subject to the supervision and direction of the supreme court. . . . It shall be the duty of the supreme court to make a *syllabus* of each opinion recorded by said court, except as hereinbefore otherwise provided": Acts of 1889, p. 87.

If the act assumed to require the judges of the supreme court to perform the duties of the clerk by preparing entries, or to discharge the duties of the sheriff by preparing returns for him, we suppose no one would hesitate to declare it void. The fact that the officer whose duties the act assumes to di-

rect the judges to perform is the reporter, and not the clerk or the sheriff, can make no difference. Neither shade nor semblance of difference can be discerned by the keenest vision between the cases instanced by way of illustration and the real case. The principle which rules is this: Judges cannot be required to perform any other than judicial duties. This is a rudimental principle of constitutional law. To the science of jurisprudence it is as the axiom that the whole is equal to all its parts is to the science of mathematics. There is no contrariety of opinion upon this subject. There is no tinge of reason for asserting a different doctrine. We quote Judge Cooley's statement of the principle, although it is found in a book intended for beginners, because it expresses the rule clearly and tersely. This is his statement: "Upon judges, as such, no functions can be imposed except those of a judicial nature": *Principles of Constitutional Law*, 53. The authorities upon this point are many and harmonious: *Hayburn's Case*, 2 Dall. 409, note; *United States v. Ferreira*, 13 How. 40, note; *Auditor v. Atchison etc. R. R. Co.*, 6 Kan. 500; 7 Am. Rep. 575; *Supervisors of Election*, 114 Mass. 247; 19 Am. Rep. 341; *Rees v. City of Watertown*, 19 Wall. 107; *Heine v. Levee Commissioners*, 19 Id. 655; *Smith v. Strother*, 68 Cal. 194; *Burgoyne v. Supervisors*, 5 Id. 9; *People v. Town of Nevada*, 6 Id. 143; *Hardenburgh v. Kidd*, 10 Id. 402; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *State v. Young*, 29 Minn. 474; *Shepherd v. City of Wheeling*, 30 W. Va. 479.

The preparation of the *syllabi* is an essential part of the reporter's work. Head-notes may be copyrighted, but the opinions of the court cannot be. The *syllabi*, or head-notes, may be copyrighted, because they are the work of the reporter, and not of the judges. The work is essentially and intrinsically ministerial, and therefore cannot be performed by the judges or the court.

The soundness of the rule stated by Judge Cooley is beyond controversy, and it is hardly necessary to go further, since it is conclusive here; but the provisions of our constitution are so clear and decisive that we cannot forbear referring to them. These provisions are found in article 7, and read thus:—

"Sec. 5. The supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon.

"Sec. 6. The general assembly shall provide, by law, for

the speedy publication of the decisions of the supreme court made under this constitution; but no judge shall be allowed to report such decisions."

These provisions, when read in connection with section 1 of article 3, distributing the powers of government, and section 1 of article 7, lodging the whole judicial power of the state in the courts, make it perfectly clear that the legislature cannot impose any of the duties of the reporter upon the judges of the supreme court. Section 5 defines the duties of the court, and to these duties the legislature can make no additions. The last clause of section 6 is a positive prohibition, and no judge can, without an open defiance of the constitution he has sworn to support, take upon himself the duties of the reporter.

The principle which controls here has been asserted and applied by this court. By force of this principle the act of 1875, concerning the office of reporter, was overthrown. Judge Buskirk, in speaking of the decision, says it was the unanimous judgment of the court: Buskirk on Practice, 12. That learned judge discusses the question at length, and very clearly proves that the legislature has no power to require the judges to exercise any of the functions of the office of reporter. There are many decisions asserting and enforcing the general principle involved here. It is, indeed, everywhere agreed that constitutional courts are not subject to the will of the legislature; for, as said in *Wright v. Defrees*, 8 Ind. 298, "the powers of the three departments are not merely equal, they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other." In the case of *Houston v. Williams*, 13 Cal. 24, the court, speaking by Field, J. (now one of the justices of the supreme court of the United States), said: "The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions." The supreme court of Arkansas, discussing the general subject, cites with approval the case of *Houston v. Williams*, *supra*, and says, of the constitutional right of the court, that "the legislative department is incompetent to touch it": *Vaughan v. Harp*, 49 Ark. 160. In a recent decision of our own it was said: "It is true that the judiciary is an independent department of the

government, exclusively invested by the constitution with one element of sovereignty, and that this court receives its essential and inherent powers, rights, and jurisdiction from the constitution, and not from the legislature": *Smythe v. Boswell*, 117 Ind. 365. Of the many other cases sustaining this doctrine, we cite *Little v. State*, 90 Ind. 338; 46 Am. Rep. 224, and authorities cited; *Sanders v. State*, 85 Ind. 318; 44 Am. Rep. 29; *Shoultz v. McPheeters*, 79 Ind. 373; *Nealis v. Dicks*, 72 Id. 374; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567; *Chandler v. Nash*, 5 Mich. 410; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *In re Janitor of Supreme Court*, 35 Wis. 410; *Speight v. People*, 87 Ill. 595; *Ex parte Randolph*, 2 Brock. 447.

It is our judgment that the petition brings before us these three questions: 1. Can the legislature impose ministerial duties upon the court? 2. Can the legislature add duties to those devolved upon the judges by the constitution? 3. Can the legislature, in violation of the constitutional inhibition, authorize the judges to discharge the essential duties of a reporter? Upon these questions we express our judgment and sustain the petitioner's contention, but we neither express nor intimate an opinion upon any others, although others are discussed.

We have no doubt that it is our right and our duty to give judgment upon the questions we have stated, because they directly concern the rights, powers, and functions of the court and no other tribunal can determine for us what our rights, duties, and functions are under the constitution.

OFFICE AND OFFICERS. — Ministerial acts are those which persons perform under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or in exercise of their own judgment upon the propriety of the act being done: *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468. Where persons, as officers, are authorized by law to perform a purely ministerial act within a stated period, with no discretion vested in them, they are liable to an action for their default: *Allen v. Commonwealth*, 83 Va. 94.

CONSTITUTIONAL LAW. — The legislature has no authority, under the constitution, to require the supreme court to give the reasons of its decisions in writing: *Vaughan v. Harp*, 49 Ark. 160.

STATE v. DORSEY.

[118 INDIANA, 167.]

INVOLUNTARY MANSLAUGHTER is where a man, doing an unlawful act not amounting to a felony, by accident kills another; or where one kills another while doing a lawful act in an unlawful manner.

INVOLUNTARY MANSLAUGHTER. — A RAILROAD ENGINEER WHO CARELESSLY AND NEGLIGENTLY runs his locomotive into a passenger-car standing upon the railroad track, and thereby causes the death of one of its passengers, is guilty of involuntary manslaughter.

L. T. Michener, attorney-general, E. D. Crumpacker, and J. H. Gillett, for the state.

J. B. Kenner and J. I. Dille, for the appellee.

BERKSHIRE, J. The indictment is made up of two counts. The second count was quashed in the court below, and from that decision the state appeals.

The appellee was a railroad engineer, and was running and operating a locomotive-engine over the Chicago and Atlantic railroad, and through Porter County, and while thus engaged he carelessly and negligently ran his locomotive-engine into a passenger-car standing upon said railroad, thereby causing the destruction of said car and the death of one William Perry, who was a passenger thereon.

The indictment contains all of the formal allegations necessary to a good indictment, and all necessary substantive allegations, if our statute defining involuntary manslaughter is broad enough to cover an involuntary destruction of life by the commission of a careless and negligent act not of itself criminal. The statute reads as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter": R. S. 1881, sec. 1908.

At common law, there is no question but that the indictment would be good. The authorities in that direction are abundant, some of which we will cite: 1 Bishop's Crim. Law, 7th ed., sec. 314; Wharton's Crim. Law, secs. 130, 329, et seq.; *State v. O'Brien*, 32 N. J. L. 169; *Commonwealth v. Kuhn*, 1 Pittsb. Rep. 13; *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346; *Mercer v. Corbin*, 117 Ind. 450; *Commonwealth v. Hartwell*, 128 Mass. 415; 35 Am. Rep. 391; *Moore's Crim. Law*, sec. 863; *Gillett's Crim. Law*, sec. 502.

The common-law definition of manslaughter, as given by

Blackstone, is as follows: "The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act": 4 Bla. Com. 191. The statutory definition of involuntary manslaughter is, word for word, the same as Blackstone's.

There is nothing to be found in the section defining this crime, or elsewhere in the statute, to indicate that the words "unlawful act" are to have a different interpretation than that given to them at common law. And the legislature having borrowed the common-law definition of involuntary manslaughter, it is fair to presume, there being nothing to indicate to the contrary, that it was the legislative intention that the statute should be construed in the light of the common law. In addition, we have the following statutory provision in regard to the construction of statutes: "Words and phrases shall be taken in their plain or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import": R. S. 1881, sec. 240. The words "unlawful act," as used in the section of the statute relating to involuntary manslaughter, are not technical words, therefore they are to have their plain or usual meaning. Webster defines the word "unlawful" as follows: "Not lawful; contrary to law; illegal; not permitted by law"; and the word "act" as follows: "That which is done or doing; the exercise of power, or the effect, of which power exerted is the cause; performance; deed." The word "unlawful," as defined by Bouvier in his law dictionary, is: "That which is contrary to law." Another definition is: "'Unlawful' implies that an act is done or not done as the law allows or requires": Anderson's Law Dict. "'Lawful,' 'unlawful,' and 'illegal' refer to that which in its substance is sanctioned or prohibited by the law": Id. "The reader should bear in mind that 'unlawful' signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution": 2 Bishop's Crim. Law, sec. 178. "A lawful act done in an unlawful or negligent manner is in law an unlawful act": *Commonwealth v. Hunt*, *supra*. "Involuntary manslaughter is where a man doing an unlawful act not amounting to felony by accident kills another; or where one does a lawful act in an unlawful manner": *Commonwealth v. Kuhn*, *supra*; see Moore's Crim. Law, sec. 863; *Regina v. Skeets*, 4 Fost. & F. 931.

It is claimed that the legislature has given a construction to the statute defining involuntary manslaughter by the enactment of sections 2172 to 2178, inclusive, of the Revised Statutes, 1881. We do not regard these sections as shedding light as to the construction to be given to the statute in question. These sections relate exclusively to the running and operating of locomotive-engines and trains of cars over railroads, and were enacted with reference to certain acts and omissions which were theretofore not criminal. We do not mean to be understood as holding that every careless or negligent act whereby death ensues constitutes malice; far from it. To constitute manslaughter, the act causing death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime.

The unlawful act charged in the indictment shows such wantonness and recklessness as to constitute manslaughter, if not murder. We are of the opinion that the second count in the indictment is good, and that the motion to quash should have been overruled.

The judgment is reversed, with the costs of this appeal, and the court below directed to overrule the motion to quash the second count of the indictment.

MANSLAUGHTER CONSISTS IN THE UNLAWFUL KILLING OF ANOTHER WITHOUT MALICE, either express or implied: *Sutcliffe v. State*, 18 Ohio, 469; 51 Am. Dec. 459; *McWhirt's Case*, 3 Gratt. 594; 46 Am. Dec. 196; *Ferguson's Case*, 3 Gratt. 594; 46 Am. Dec. 196. Where malice is wanting, the killing may be either voluntary or involuntary: *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711. Kinds of manslaughter stated and explained: *State v. Elleck*, 2 Winst. 56; 86 Am. Dec. 442.

MANSLAUGHTER — INSTANCES OF KILLINGS ADJUDGED TO BE MANSLAUGHTER ONLY. — Where a prisoner unintentionally killed a woman while endeavoring to frighten her with a revolver, he was guilty of manslaughter: *State v. Hardie*, 47 Iowa, 647; 29 Am. Rep. 496. Where one brandishes a loaded pistol in a room where there are other persons, and accidentally kills one of them, he is guilty of manslaughter: *State v. Emory*, 78 Mo. 77; 47 Am. Rep. 92. Where a police-officer without warrant, and for an offense not committed in his presence, arrested an innocent man, and in trying to prevent his escape, killed him, this was at least manslaughter: *Reneau v. State*, 2 Lea, 720; 31 Am. Rep. 626.

MANSLAUGHTER, WHAT CONSTITUTES, AND HOW DISTINGUISHED FROM MURDER: Note to *Commonwealth v. Webster*, 52 Am. Dec. 736. An indictment for manslaughter of a babe, committed by a mother in exposing it, which charges wrongful acts resulting in exposure of the babe, that from such exposure it died, is not defective because it fails to state that the mother was bound to protect the child, nor in failing to state that the

child was not able to help itself: *State v. Behm*, 72 Iowa, 533. There is no element of manslaughter where the evidence shows that the defendant was asked by the deceased if the defendant did not have a man, who was with him, under arrest, and thereupon defendant shot him and killed him, for such evidence proves murder; nor is there any element of manslaughter where the evidence shows that deceased met defendant and called him a d—n horse-thief, and at the same time dropped the muzzle of a loaded rifle upon defendant's bowels; that defendant endeavored to take the rifle away from deceased, and not succeeding, shot him in the scuffle, while deceased was trying to shoot defendant; for such evidence, if true, proves innocence and self-defense: *State v. Byers*, 100 N. C. 512. But even though there exists no element of manslaughter in a criminal case, yet if the jury find a defendant guilty of manslaughter, it is proper to sentence him therefor: *Fagg v. State*, 50 Ark. 506.

CENTRAL UNION TELEPHONE CO. v. FALLEY.

[118 INDIANA, 194.]

TELEPHONE, AS THE WORD IS USED IN THE STATUTES OF INDIANA, means an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages.

TELEPHONE COMPANIES ARE COMMON CARRIERS OF NEWS, AND AS SUCH SUBJECT TO PROPER REGULATIONS requiring them to conduct their business in a manner conducive to the public benefit.

TELEPHONE COMPANY MAY BE COMPELLED BY MANDAMUS to furnish any person or company the like service which it furnishes to others, and on like terms.

THE PRICE TO BE CHARGED FOR THE USE OF TELEPHONES AND TELEPHONIC CONNECTIONS may be regulated by the legislature relative to business conducted within the state.

TELEPHONE COMPANIES MUST FURNISH EACH PERSON, under the statutes of Indiana, with a telephone and with telephonic communications and connections; and cannot relieve themselves from their liability so to do by abandoning what is known as the exchange and rental system, and substituting therefor another system, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon the payment of a certain toll.

FACT THAT A TELEPHONE COMPANY HAS EXTENDED ITS LINES THROUGH DIFFERENT STATES, and is engaged in interstate commerce, will not relieve it from the operation of state statutes, upon business conducted wholly within the state, nor justify its refusal of a telephone and the best telephonic connections and facilities to a person doing business in such state, on the terms prescribed by such statute.

THE RIGHT TO A WRIT OF MANDATE TO COMPEL THE FURNISHING OF TELEPHONIC FACILITIES IS NOT TAKEN AWAY by a statute imposing a penalty for refusing such facilities. The statutory remedy is cumulative merely.

J. R. Coffroth, T. A. Stuart, and A. A. Thomas, for the appellant.

W. D. Wallace, S. P. Baird, and F. S. Chase, for the appellee.

OLDS, J. This is an action brought by the relatrix to compel the appellant, by mandate, to furnish her, at her place of business in the city of Lafayette, a telephone and telephonic connections and facilities. The petition is in one paragraph, averring the following facts: That the defendant, the Central Union Telephone Company, is a corporation duly organized under the laws of the state of Illinois; that it is now, and was at the time of the doing of the acts and things hereinafter complained of, and for three years last past has been, owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, county of Tippecanoe, state of Indiana; that the relatrix, Susana B. Falley, is now, and for more than three months last past has been, carrying on business under the name and style of the "Falley Hardware Company," and the occupant of a business-room in said city, at Nos. 37 and 39 on South Third Street therein, and her business-room is within the limits of the defendant's telephone business in said city; that the relatrix did, on the twenty-fifth day of October, 1887, demand of the defendant that said relatrix be furnished by said defendant with a telephone and telephonic connections and facilities necessary to place the relatrix, at her said business-room, in telephonic connection with the patrons of defendant in said city; that the relatrix did then, and at the time of making said demand, tender to the defendant the sum of nine dollars, lawful currency of the United States, as a rental in advance for such telephone, telephonic connections, and facilities for the first three months' use thereof, and at the same time relatrix offered to comply with the reasonable rules and regulations of said defendant not inconsistent with the laws of this state; that the defendant at the time said demand was made refused, and ever since has willfully, wrongfully, and without cause, failed and refused, and still fails and refuses, to furnish to said relatrix, at her said business-room, the use of such telephone and telephonic connections and facilities; that the defendant is a common carrier of telephonic messages between its patrons within the limits of said city of Lafayette; and that said relatrix, under the laws of the state of Indiana, is entitled to demand and receive from the defendant the use of the telephone and telephonic connections, facilities, and service necessary to place the relatrix, at her said business-

room, in telephonic communication with the patrons of defendant in said city for the compensation of three dollars per month, as fixed and prescribed by the statute of said state, and for such compensation she is entitled to receive from the defendant the use of a telephone, and the highest and best grade of telephonic connections, facilities, and service, used and furnished by said defendant in carrying on its business in said city. Prayer for an alternative writ of mandate, and, on final hearing, a peremptory writ compelling defendant to furnish relatrix with such telephone and telephonic connections, facilities, and service, which petition was duly verified. Alternative writ of mandate issued upon the complaint in due form, setting forth the filing of the complaint and the allegations of the complaint, and concluding by commanding the appellant to furnish the relatrix with a telephone and telephonic connections and facilities as asked, or in default thereof, to appear before the court and show cause.

In answer to the writ, appellant appeared by attorneys and demurred to the writ for the cause that the writ did not state facts sufficient to constitute a cause of action, which demurrer was overruled, to which ruling of the court on the demurrer appellant excepted. Appellant then filed an answer in five paragraphs. The first is a general denial, and the other paragraphs allege the following facts:—

2. The defendant avers that it is a corporation under the laws of Illinois; that for several years prior to the demand by plaintiff, as alleged in the complaint, defendant had been engaged in carrying on its business as a telephone company in the states of Indiana, Ohio, Illinois, and Iowa; that long before and at the time of the happening of the things complained of in plaintiff's complaint, defendant had, ever since had, and now has its lines and wires on its poles in the city of Lafayette, and in various cities and towns in the states aforesaid, and during all of said time and still has offices in said various cities and towns in each of said states connected with each other, and many of its offices and telephones in this state are connected by means of its wires with defendant's offices and instruments in the states of Ohio, Illinois, and Iowa; that defendant during all of said time was, has been, and is engaged in transmitting messages for the public for hire over its said wires, not only between towns and cities in each of said states, but also between the several states aforesaid; and during all of said time defendant has been

and is engaged in and carrying on interstate commerce; that it admits that plaintiff, claiming that, under the act of the general assembly of the state of Indiana, she was entitled to have a telephone in her store, and to be furnished with telephonic service under said law, tendered defendant nine dollars, and demanded to have a telephone in her store; and defendant admits that it refused to furnish relatrix with a telephone, and with telephonic connections and service, because if defendant had complied with said request and demand she would thereby be furnished facilities for transmitting messages from Lafayette to various places in the states of Ohio and Illinois, where defendant had and has its wires and offices, as aforesaid, for said sum of money, which was unreasonable and greatly less than defendant charges its other customers, and which, as defendant was engaged in carrying on interstate commerce, could not be required of it.

3. The third paragraph states that it, defendant, is a corporation under the laws of Illinois, and is engaged in carrying on a general telephone business in the city of Lafayette; that, on the second day of March, 1886, it in good faith announced to the public and it was then its intention from and after the second day of March, 1886, not to furnish telephones under a rental system, except as it did so until its contracts then in existence expired; that at said time it had a large number of contracts with its various subscribers in the city of Lafayette for the use of its telephones, by the terms of which defendant was compelled to maintain its exchange in said city, and furnish telephone facilities to said persons until the thirtieth day of September, 1886; that defendant treated all applications for telephones and telephonic service alike; that, in good faith, and without discrimination, having determined to cease doing a general rental telephone exchange business in this state, it refused to furnish telephones and telephonic connections under a general rental telephone exchange system, except to those with whom it had contracts, as aforesaid; that it admits the demand and tender by relatrix and the refusal by defendant to furnish her with a telephone, because it had determined to cease, and had in fact ceased, doing a general rental telephone exchange business in said city, and so informed relatrix, and since that time has not been and is not engaged in a general telephone business under a rental system in said city; that after it had announced its determination to cease doing a general rental telephone ex-

change business, it, in June, 1886, determined to offer to the public, and did in fact offer to the public, to furnish telephonic service and connections by means of public toll-stations at various points in said city, which system of public toll-stations defendant had in operation at and long before the time of the demand by relatrix for telephone and telephonic connections.

Defendant denies that it owns or operates a telephone exchange under the rental system in said city of Lafayette, Indiana, or that it did at the time of the commencement of this action; that although it had formerly conducted a telephone exchange under the rental system, it abandoned and terminated the same as soon as its contracts in existence were terminated. The defendant avers that what is known as a telephone exchange under a rental system is, where lines and telephone instruments are furnished to subscribers for private use, under contracts limiting the use of the facilities furnished to such subscribers and their employees, for a stipulated rental per month, quarter, or year, and in which the instruments furnished pass into the possession of such subscribers; the lines so furnished to subscribers center at a switching-station, where the line of any subscriber is connected with that of any other subscriber, on request, for purposes of communication authorized by the contract. In the exchange system, a set of telephone instruments, connected by a wire with the central station, is furnished to any reputable person who desires to become a subscriber to the exchange, and signs the usual form of contract, and complies with its conditions. A public toll system of telephone service is one where the telephone company furnishes no instruments or lines for private use for a rental charge, but establishes stations of its own, for the accommodation of the public, in such places as may appear to it necessary to furnish telephonic facilities and connections to the public, charging a toll for each use of its instruments and lines, such toll-stations being in charge of agents selected, appointed, and paid by the telephone company, the instrument at such station remaining in the possession and control of the company, through its agents; the lines from such stations extend to a switching-station, where one is connected with another upon the order of any agent, which agent collects from the user the toll charged for each and every connection, and accounts for the same to the company; that such toll system is simply an extension of the toll system which the

defendant, since its organization for some years past, and prior to the enactment of the telephone statutes in this state, was maintaining, and has maintained, in various towns of this state, providing telephonic facilities between individuals residing in different towns where toll-stations are established; that at the time of the commencement of this suit it did not, does not now, nor does it intend to, discriminate against the relatrix, and is still and now is ready and willing to supply the relatrix and all applicants with such facilities as it has in said city.

The paragraph further sets out in detail the manner of operating and conducting the toll-station system, and alleges that all its business in the city of Lafayette, at the time of the commencement of this suit, and ever since, has been conducted on that system, and that it was not at that time nor since doing, and does not intend to do, a telephone business under the rental system; that notices of the rates and fees charged for the use of the telephones are posted in each station. A copy of the contract that it enters into with its agent is set out. The answer denies any discrimination against the relatrix, or any intention to discriminate, and alleges that the toll-stations are so distributed as to accommodate the general public, and that there are a number in the vicinity of the place of business of the relatrix, and denies being a common carrier, and denies being bound to rent telephones at all, or as demanded by relatrix; that defendant offered to establish a toll-station on relatrix's said premises, and she refused to allow it to be done, or to sign a contract of agency.

The following is a copy of the contract set out with this paragraph of answer:—

“CENTRAL UNION TELEPHONE COMPANY—STATION CONTRACT
—CENTRAL STATION.

“This agreement, made this — day of —, 188—, by and between the Central Union Telephone Company, its successors or assigns, party of the first part, and —, party of the second party, witnesseth: The second party agrees: 1. To permit the party of the first part to place its wires, fixtures, telephone instruments, and apparatus in and upon the premises of the second party, located on — street, in the — of —, county of —, in the state of Indiana, for the purpose of doing a general telephone and telegraph business; that he, —, said second party, is to furnish proper office-

room, rent, light, and fuel, and necessary employees to transact all business of the party of the first part, at said station, in a prompt and business-like manner; to collect for all such business such regular rates as may be fixed from time to time by the party of the first part, and the same to account for to the said first party; and further, to observe and conform to such rules and regulations touching said business as may from time to time be prescribed by said first party. In consideration thereof, and in full payment therefor, the first party agrees to pay to the second party five per cent commission upon the receipts at said station for business with regular stations within — miles of the county court-house in said —, and — upon receipts for business going over to extra-territorial lines of the first party. It is further mutually agreed that should the telephone or telegraph station herein referred to fail to be sufficiently remunerative, or its management by the party of the second part prove to be unsatisfactory to the party of the first part, the right to terminate this agreement at any time is reserved by the party of the first part; but otherwise, this agreement is to be in force and effect until the last of —, 188—, and thereafter until the party of either part shall have given the party of the other part ten days' written notice of his or its desire to discontinue the same. Witness the hands of the parties," etc.

4. The fourth paragraph alleges the ceasing to do business by the defendant under the rental system and conducting the same under a toll-station system, as alleged in the third paragraph, and avers that one Edward E. Falley is a partner of relatrix, and that they are trading under the name of Falley Hardware Company, and that prior to the demand by relatrix for a telephone, as set out in the complaint, defendant had a telephone in their place of business under the toll-station system, and said firm acted as the agent of defendant in the operation of the telephone; that said firm terminated said contract of agency, and the relatrix then made the demand as alleged, and defendant refused for the reasons as stated in the third paragraph of answer.

The fifth paragraph is not in the record.

Appellee filed separate demurrers to the second, third, fourth, and fifth paragraphs of answer for the cause that neither of said paragraphs stated facts sufficient to constitute a defense or return to said alternative writ of mandate.

The first paragraph of answer was withdrawn by appellant,

and the court sustained the demurrers to the second, third, fourth, and fifth paragraphs; to which ruling of the court in sustaining the demurrers to the several paragraphs of answer appellant duly excepted, and appellant failure to amend or plead further, the court rendered judgment on said demurrers, ordering and adjudging that a peremptory writ of mandate issue, commanding appellant to forthwith furnish and supply relatrix, at her business-rooms, Nos. 37 and 39 South Third Street, in the city of Lafayette, Indiana, with a telephone, and with the highest and best grade of telephonic connections and facilities and service used, furnished, and employed by said appellant in carrying on its said business in said city, and that might be necessary to place her, at her said place of business, in telephonic communication with all persons in said city having at their places of business or residences telephones placed and maintained there by said appellant; and that said appellant continue to supply and furnish the same, etc., so long as appellant continued to carry on a general telephone business in said city, and so long as relatrix shall continue to observe the reasonable rules, etc., and pay the compensation of three dollars per month. To the rendering of which judgment the appellant excepted. Appeal prayed and granted to this court. Errors are properly assigned on the rulings of the court.

This action is brought under the acts of 1885 prescribing the duties of telephone companies, and to regulate the rental to be paid for the use of telephones, and requires a construction of these acts. On April 8, 1885, the following law was enacted:—

“An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.”

Section 1 relates exclusively to telegraph companies.

“Sec. 2. Every telephone company with wires wholly or partly within this state, and engaged in a general telephone business, shall, within the local limits of such telephone company's business, supply all applicants for telephone connections and facilities with such connections and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in

like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.

"Sec. 3. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offense, to be recovered in a civil action in any court of competent jurisdiction; provided nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise": Acts of 1885, p. 151.

On the 13th of April, 1885, another law was enacted, which is as follows: —

"An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation.

"Section 1. That no individual, company, or corporation now or hereafter owning, controlling, or operating any telephone line in operation in this state shall be allowed to charge, collect, or receive as rental for the use of such telephones a sum exceeding three dollars per month where one telephone only is rented by one individual, company, or corporation. Where two or more telephones are rented by the same individual, company, or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"Sec. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company, or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected, or received.

"Sec. 3. Any owner, operator, agent, or other person, who shall charge, collect, or receive for the use of any telephone any sum in excess of the rates fixed by this act shall be deemed guilty of a public offense, and on conviction shall be fined in any sum not exceeding twenty-five dollars": Acts of 1885, p. 227. This act took effect July 22, 1885.

It is insisted by appellant that the act of April 8th is simply an act prohibiting discriminations by telephone companies,

and providing a penalty for any discrimination by such companies, and that the act of April 13th prescribes the price which may be charged for the rental of telephones when the same are rented, and prescribes penalties for asking or taking a greater rental, and that unless they inhibit all other systems or methods of telephony other than the rental, this case was decided wrongly by the court below; and that the title to the act of April 8th declares it to be an act prohibiting discrimination between patrons, and prescribing penalties therefor.

It is further claimed by appellant that the answers show that appellant was not engaged in a general telephone business at Lafayette at the time of appellee's demand, but was engaged only in a limited business, and that it offered to furnish appellee such limited service, and has in all respects offered to treat her in the same manner as it was treating its other patrons, but that she wanted a different service than that in which appellant was engaged; in other words, she wanted appellant to discriminate in her favor, and to grant her demand would make appellant amenable to the law against discrimination.

In determining this case, it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists to send, receive, and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "an instrument for conveying sound to a great distance."

In the case of *Central Union Telephone Co. v. Bradbury*, 106

Ind. 1, the word "telephone," as used in the act of April 13, 1885, was held to mean "an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons, and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or

company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the cases of *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404; *Vincent v. Chicago etc. R. R. Co.*, 49 Ill. 33; *People v. Manhattan Gas Light Co.*, 45 Barb. 136. And the principle held in these cases is in accordance with the well-settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities, and service; and even if it were controverted, it is well settled by authorities that the legislature has the right to do so, relative to the business conducted within the state: *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; *Central U. Tel. Co. v. Bradbury*, *supra*, and authorities cited in those cases; *Johnson v. State*, 113 Ind. 143; *Munn v. Illinois*, 94 U. S. 113; *Ouachita Packet Co. v. Aiken*, 121 Id. 144; *Patterson v. Kentucky*, 97 Id. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telephone company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation, or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the legislature that where a telephone company was doing a general telephone business in this state, any person within the local limits of its business in a town or city should have the right to demand and receive

a telephone and telephonic connections, facilities, and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the state. The legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual and gave him the right to demand and receive such service within the limits of the company's business, in any town or city where such company is doing a general telephone business.

It is insisted, as it appears by the answer that the lines of the appellant extended through the states of Ohio, Indiana, and Illinois, that appellant was engaged in interstate commerce; that it was a common carrier of news between the states, and that therefore such statutes are an interference with interstate commerce. We cannot agree with that theory. These statutes simply provide that telephone companies shall provide persons within this state with certain service, and for such service shall receive a certain compensation. They only seek to control the service within this state. If section 2 of the act of April 13th, providing for the price to be paid for connections between two cities or villages, should be construed to apply to two cities or villages one of which was without this state, then there would be some question as to the validity of that section, or the power of the legislature to control the price to be paid for a message or the use of the telephone for communicating with a person beyond the limits of the state; but that question is not involved in this case, as one section of a statute may be valid and another not. Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been granted some rights and privileges by acts of Congress which cannot be abridged or interfered with. In the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, referred to by counsel for appellant, it was held that the act was void in so far as it sought to govern the delivery of messages outside of the state: *State v. Newton*, 59 Ind. 173.

It is also contended by counsel for appellant that as the statute provides a remedy other than that by mandate for a violation of the statute, the writ of mandate is not a proper remedy.

The right to have the telephone and telephonic connections

and facilities is a right given by the statutes. It is a legal right, which may be enforced by mandate. No remedy is adequate which does not give the person that to which he is entitled by law; the penalty of one hundred dollars is cumulative, and does not abridge or take away the right to a writ of mandate. The statute itself provides that the act shall not be so construed as to "abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise." The statute should be so construed as that the penalty shall not take away any of the other remedies the aggrieved person may have, one of which remedies is by writ of mandate. This court held, in the case of *Central Union Tel. Co. v. Bradbury*, *supra*, that Bradbury was entitled to his remedy by writ of mandate compelling the company to furnish him with a telephone and telephonic service. The right to a writ of mandate requiring telephone companies to furnish telephonic service to persons entitled thereto has been held in *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583; also by the supreme court of Pennsylvania, in *Bell Telephone Co. v. Commonwealth*, 59 Am. Rep. 172. In this case the complaint states a good cause of action under the statutes.

The second paragraph of the answer alleges the conducting of the defendant's business in the several states, and that it is engaged in interstate commerce, and that to furnish relatrix with an instrument and connection with its lines would put her in connection with its offices outside of the state, and furnish her facilities for transmitting messages from Lafayette to various places in Ohio and Illinois, where the appellant has its wires and offices. This paragraph does not controvert the facts alleged in the complaint, that appellant, at the time of the acts and things complained of, etc., was owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, and that the place of business of the relatrix is within the limits of the appellant's telephone business in said city; and it must also be remembered that the demand, as alleged in the complaint, was only that she be furnished with a telephone and telephonic connections and facilities necessary to place her, at her said store, in telephonic communication with patrons of appellant in said city. The statutes contemplate two kinds of service, and different compensations for each; one, connections and facilities for conversing with patrons of

the company within any city or town where an exchange is maintained; the other, for conversing between two towns or cities.

The other paragraphs show the appellant to have been engaged in a general telephone business in said city, operating the same under a toll system at the time of the demand and tender by relatrix, and do not controvert the allegations in complaint that the plaintiff's place of business is within the local limits of appellant's business in said city. Neither of the paragraphs of answer is sufficient.

Under the construction we have given the statutes, there was no error committed by the court below in overruling the demurrer to the complaint, sustaining the demurrers to the answers, or in granting the writ of mandate.

The judgment is affirmed, with costs.

LAW OF THE TELEPHONE. — Probably no invention or implement which has come into so general use as the telephone has, in the same period of time, ever occasioned so small an amount of litigation. Even such litigation as has arisen has been mainly devoted to the determination of questions of a public character, and has rarely been carried on by private individuals asserting or defending what they believed to be their private rights. In considering such questions as have been presented to them, the courts have almost uniformly regarded the telephone and the public and private rights and duties growing out of it as similar in character and extent to the telegraph, and the public and private rights growing out of its invention and general use. Thus in England, the term "telegram" has been adjudged to include a conversation by means of a telephone, and the telephone business to be within the statute giving to the postmaster-general the exclusive control of the transmission of messages by telegraph: *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. D. 244. In Iowa, telephone companies are classed with telegraph companies, for the purpose of determining the jurisdiction of justices of the peace over them: *Franklin v. N. W. Telephone Co.*, 69 Iowa, 97; and of deciding where and how they and their property shall be assessed: *Iowa Union Telephone Co. v. Board of Equalization*, 67 Id. 250. So in discussing whether telephone corporations were entitled to use the public streets, or to exercise the right of eminent domain, and whether they were subject to legislative control for the purpose of preventing unreasonable discriminations and the imposition of exorbitant charges, the courts have generally proceeded upon the assumption that the rights, duties, and obligations of such corporations are analogous to those formed for the purpose of carrying on the business of transmitting messages and news by the use of the telegraph.

In Wisconsin, the statute regarding corporations provided, among other things, that corporations might be formed "to build and operate telegraph lines, or conduct the business of telegraphing, and to conduct and maintain such lines with all necessary appurtenances." It was held that this statute authorized the incorporation of a telephone company. The court, in considering the question, said: "It is urged that the powers thus expressly given

to form and organize corporations for the purpose of building and operating telegraph lines, or conducting the business of telegraphing in any way, includes the power of forming and organizing corporations for the purpose of building and operating telephone lines, or conducting the business of telephoning in any way. Of course there is a distinction between the two classes of business; but in almost every respect they are very similar, if not identical. Each of them must erect its poles or posts, and upon the tops of them attach its lines of wire from point to point. Each must almost necessarily enter upon, along, or across public roads, highways, streams, bodies of water, and upon the lands of individuals, for the purposes mentioned. In these respects, they seem to be identical. One may require more lines of wire than the other; but we are not aware of any other distinction outside of their offices or places of operation distinguishable to the naked eye. It is these indistinguishable features alone that the city of Oshkosh had to deal with. Possibly there may be a marked distinction in the varying intensity of the electric currents in the one case, and in the other at the point of transmission or receiving, or even at the points along the line; but such difference, if it exists, hardly concerns the question here presented. As for the difference in the mode of communication by means of telegraphic and telephonic apparatus, see *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. D. 244. In that case, Mr. Stephen, one of the judges of the exchequer division of the high court of justice, who, unlike most American judges, seems to have sufficient time not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definite discussion of that subject. In that case, the court conclude that Edison's telephone was a telegraph within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere 'fact — if it is a fact — that sound itself is transmitted by the telephone establishes' no material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity. It is there further said that, 'of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented; but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing further discoveries as to the use of electricity for the purpose of conveying intelligence.' It is upon this theory of progressive construction that the powers conferred upon Congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service, known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of communications by telegraph: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. If there remains any doubts as to the power given to charter a telegraph company being sufficiently broad to include a telephone company, then it must be dispelled by the general clause above quoted from section 1771, to wit, 'for any lawful business or purpose whatever, except,' etc.; for by a well-settled rule of construction, these general words extend to things of a kindred nature to those specifically authorized by the section, and hence to whatever is of a kindred nature to telegraphing, which most certainly includes telephoning. *Noscitur a sociis*. We must conclude that, under the statute, it was competent to form, organize, and incorporate a telephone company pos-

essing like powers with those given to telegraph companies": *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 36.

The statute of Pennsylvania controlling telegraphic corporations enacted that "the said telegraphic corporations shall receive dispatches from and for other telegraph lines and corporations, and from and for any individual; and on payment of their usual charges to individuals for transmitting dispatches as established by the rates and regulations of such telegraph line, transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do." On an application being made to the court of common pleas of the city of Philadelphia by the commonwealth on the relation of the Baltimore and Ohio Telegraph Company for a writ of mandate to compel the Bell Telephone Company to give the relator a telephone and the necessary wires, the court, by Arnold, J., in *Bell Telephone Co. v. Commonwealth ex rel. Baltimore & O. T. Co.*, 35 Alb. L. J. 4, reported also in note to *Chesapeake & P. Tel. Co. v. B. & O. Tel. Co.*, 59 Am. Rep. 172, which was adopted by the supreme court of the state, April 19, 1886, in disposing of the appeal in the same cause, determined that telephone companies were controlled by the provisions of this statute, and therefore could not withhold from one person or corporation the privileges which it conceded to another.

Among the obvious powers of telephone corporations is that of imposing reasonable rules for the transaction of their business, and for the observance of those using their telephones. As these implements are intended for general use by persons of all classes and of both sexes, those who use them may be required to conduct their conversations in a becoming manner, free from obscenity or profanity; and for a violation of this requirement may be denied the further use of the telephone: *Pugh v. City & S. Telephone Co.*, 9 Cincinnati Law Bulletin, 104; 27 Alb. L. J. 162. But no regulation will be tolerated which prevents the public from having a fair and reasonable use of the telephone and telephonic exchanges, or denies to any one the rights secured to him by any statute, or requires him to conduct his business with particular persons or agencies. Hence a regulation is unreasonable and invalid if it prohibits subscribers from calling a messenger otherwise than through the central office: *People v. Hudson River Telephone Co.*, 19 Abb. N. C. 466; 10 N. Y. Sup. Ct. 282.

A telephone corporation is, for many purposes, regarded as a common carrier; and it may, doubtless, like other common carriers, be authorized to exercise the power of eminent domain for the purpose of acquiring the right to maintain its poles, wires, and other necessary appliances upon and over private property: *State v. Am. & E. C. N. Co.*, 43 N. J. L. 381; *N. O. Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7. A more serious question has regard to what it may be authorized to do in and upon the public highways, without exercising the right of eminent domain, and without obtaining the assent of the adjacent proprietors. If the fee of a street or other highway is in the proprietor of the adjacent lands, subject to the easement which has been previously acquired in such street for public use, and the legislature undertakes to sanction the use of such street by a telephone corporation, the statute is clearly invalid unless the new use may fairly be regarded as one of the uses for which the street has been already appropriated, and not as a new appropriation or an additional burden. The public cannot be expected to continue using its streets in precisely the same manner or for the same purposes as when they were first dedicated to public use. Nor is the use which may be made of a street confined

to the passage of persons, animals, and vehicles over it. Sewers and gas and water pipes may be laid beneath its surface; and it may generally, under authority of the state or of the municipality, be devoted "to all such uses as are conducive to the public good, and do not interfere with its complete and unrestricted use as a highway": *Ferrenbach v. Turner*, 86 Mo. 426; 56 Am. Rep. 437. The passing and repassing along public highways must necessarily be diminished by the use of the telephone, and hence the burden of the public use is diminished rather than increased by the existence of telephonic facilities. It is true that one of the objects of the erection of poles, and the like, for the carrying on of the business of telephoning or telegraphing, is to make profit for private persons or corporations. This, however, cannot be made the test of a public use without excluding from the streets all private business. While the question is not yet free from dispute and doubt, a slight preponderance of the decisions sustains the validity of those statutes and municipal ordinances which authorize telephone and telegraph corporations to erect their poles in and to stretch their wires across the public highways without making compensation to adjacent proprietors: *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7; *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258; 57 Am. Rep. 398; *St. Louis v. Bell Telephone Co.*, 96 Mo. 628; 9 Am. St. Rep. 370; *contra*, *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Willis v. Erie T. & T. Co.*, 37 Minn. 347, in which the court was evenly divided on the question.

The right to use the street for the purpose of erecting and maintaining poles and wires for use in connection with telephones does not exist unless conferred by statute or ordinance; and even when granted by statute, will be prohibited by injunction unless the right is obtained in the manner pointed out by such statute: *Broome v. New Jersey Telephone Co.*, 42 N. J. Eq. 141; *New York and New Jersey Telephone Co. v. Township of East Orange*, 42 Id. 490. The location and maintenance of telephone poles, when authorized by law, should be in such a mode as not to needlessly incommode the public, and for any negligence from which a person in the use of the highway is injured, the telephone company is answerable in damages: *Sheffield v. Central Union Telephone Co.*, 36 Fed. Rep. 164; *Pennsylvania Telephone Co. v. Varnan*, Sup. Ct. of Penn. A grant of the right to locate telephone poles in the streets, and to stretch wires thereon, does not include an authorization to enter upon private property, even for the purpose of cutting off the limbs of trees which overhang the street, if the line might have been located so as not to interfere at all with the trees, with but little additional expense: *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; 57 Am. Rep. 237.

The duties of telephone corporations to the public are very similar to those of common carriers and telegraph corporations. They are obliged to extend their facilities to all persons who are willing to comply with reasonable regulations, and to make such compensation as is exacted of others in like circumstances. The right to discriminate between persons and corporations, and to grant their facilities to some while they were denied to others, was attempted to be exercised in many instances, and was not relinquished until after the most persistent litigation. But from the very first, the courts interposed by writs of mandate in favor of persons to whom the use of the telephone had been denied: *State v. Bell Telephone Co.*, 10 Cent. L. J. 438; 11 Cent. L. J. 359; 22 Alb. L. J. 364; *State v. Bell Telephone Co.*, 23 Fed. Rep. 539; *Bell Telephone Co. v. Commonwealth*, 35 Alb. L. J. 4; also reported

in note to 59 Am. Rep. 172; *Louisville Transfer Co. v. American District Telephone Co.*, 14 Chic. L. N. 15; 24 Alb. L. J. 283.

About the time that telephones came into general use, the Western Union Telegraph Company secured a contract with the American Bell Telephone Company, the result of which was that the latter, in granting to other corporations and companies the right to use the telephone, and to establish telephonic exchanges, stipulated that they should not be used in receiving or delivering messages which had been sent over the wires of telegraph corporations other than the Western Union Telegraph Company. This stipulation was urged in many cases by local telephone companies as a reason why a writ of mandate should not issue to compel them to grant to telegraph companies other than the Western Union the telephonic facilities accorded to other corporations and individuals. In one state only was the defense sustained. The reasoning of the court in that state was as follows: "A statute of this state provides, in effect, that every telephonic company shall, with impartiality, permit persons and corporations to transmit speech through its wires by instruments. The utmost reach of this is to require of them to make an impartial use of such rights or privileges as they possess. If their system is carried into effect by instruments which are not the subjects of a patent, and they so conduct their business as to become common carriers of speech, they are to serve applicants with impartiality; or if it is carried into effect by patented instruments, of which patents they are the owners, the same result is to follow; but if it is carried into effect by instruments which are the subjects of a patent which is the property of a resident of another state, and from which they are able to purchase, not the instruments themselves, but only a right to a temporary use thereof, subject to conditions and limitations, they are only required to give impartially to applicants the use of the full measure of right they have been able to procure. The statute cannot confer power upon courts, either to order them to buy that which cannot be bought, or to use the property of another without his consent. The legislature may deny the use of highways for the erection of poles for the support of wires to any corporation which is not the full owner of telephonic patents by which its system is operated, and which is not able to give a perfectly unrestrained and impartial use of all their capabilities to applicants, or to any corporation which proposes to use telephonic patents under any restrictions whatever imposed by the owner, and so embarrass and hinder as to induce them to become full owners of such patents or retire from the service of the public. Legislatures, for reasons of public policy, in many ways put limitations upon absolute owners in the use of their property, but they cannot transfer the property of one to another without compensation, even for the public good": *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352; 44 Am. Rep. 237.

Before this decision had been pronounced, the same question had been determined in other jurisdictions adversely to the right to discriminate, even when founded upon reservations in the contract by which the defendant had secured the right to use the telephone: *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; 10 Cent. L. J. 438. In Ohio, it was declared by the highest court that the defendant corporation, after being incorporated under a statute requiring it to serve all persons impartially and in good faith, could not shield itself "by any self-imposed restrictions contained in the stipulations of a contract with the American Bell Telephone Company"; that letters patent did not authorize the patentee to vend or use his invention "in a manner which but for the letters patent would be unlawful";

and that "the use of tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation simply because the patentee acquires a monopoly in his discovery"; that "the property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by state laws, when the public welfare requires it": *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583. Like views were reaffirmed and enforced in *Chesapeake etc. Telephone Co. v. Baltimore etc. Tel. Co.*, 66 Md. 399; 59 Am. Rep. 167; 35 Alb. L. J. 271; *Louisville v. American District Tel. Co.*, 24 Id. 283; *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201; 25 Am. Law Reg. 325; *Bell Telephone Co. v. Commonwealth*, 59 Am. Rep. 172; *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404. In the case last named, the right of the applicant to have a telephone was not grounded upon any special statute of the state against discrimination; nor was any special contract between the defendant and the American Bell telephone urged in defense. The applicant was an attorney between whom and the local company a difficulty had arisen on account of its not furnishing him with a list of subscribers, and his consequent refusal to pay for his telephone during the period when such list was not to be had. The telephone was then taken away from his office, and he was refused another, on the claim that his conduct had forfeited his right to it. The court was of the opinion that if anything was due for the former use of a telephone, the company's remedy for its collection by an ordinary action was adequate, and therefore declined to consider that question. In affirming the applicant's absolute right to be furnished telephonic connections and facilities on the same terms as others, the court said: "It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there; that, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations; that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public. That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as common carrier. The views herein expressed are not new. Similar questions have arisen in and have been frequently discussed and decided by the courts; and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike

who are like situated, and not discriminate in favor of or against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public do not apply to telephones, for the reason that they are of recent invention, and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce, nor to the particular kind of service known or in use at the time when these principles were enunciated, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, and from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, and from the telegraph to the telephone, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

A question which has not yet been necessarily determined, except in one state, is, whether the general legislative control to which telephone corporations must submit includes the supervision by the legislature of the charges which may be exacted for the use of their telephonic facilities. If the state possesses an arbitrary power in this respect, it is clear that the grant of letters patent may be substantially annulled by statutes which withhold from inventors the profits for the better realization of which their patents were obtained. In Indiana, a statute enacted in 1885 fixed the maximum rental of telephones in that state at three dollars per month. All attempts at resisting or evading this enactment have so far proved futile. The general constitutionality of the statute was affirmed in *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201. It appeared in that case that the company had sought to evade the statute by making separate charges for the several instruments, all of which were necessary to be used with the telephone. But the court decided that in the term "telephone" was included the entire apparatus "ordinarily used in the transmission as well as the reception of telephonic messages." These views were reasserted by the same court in *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1. The next attempted evasion of the statute was the imposition of a charge for the use of the telephone by non-subscribers, which, with the amount charged the subscriber for his use of it by and for himself, exceeded the amount allowed by law. As the charge for non-subscribers was collected irrespective of the amount of use by such non-subscribers, and whether any non-subscriber used the telephone or not, it was treated as a violation of the statute, and as justifying the conviction and punishment of the offender: *Johnson v. State*, 113 Ind. 143. The latest method of escape from the statute is shown in the principal case, and consisted of the refusal to place telephones in the offices of subscribers, and requiring them to resort to the offices established by the telephone company for the purpose of sending or receiving messages. The right to do this was also denied, and the duty of the company to furnish telephonic facilities in the usual manner enforced. The result of the decisions up to the present time is, that to avoid legislative control the companies must withdraw their instruments from the state, in which event it has been held they might en-

join, as an infringement of the patent, any attempted use of them: *American Co. v. Cushman*, 36 Fed. Rep. 488.

The right of a city to regulate the charge for the use of telephones has been denied. The right was claimed to have been conferred by that part of the city charter which authorized the city to regulate the use of its streets, and "to license, tax, and regulate telegraph companies or corporations, and all other business, trades, avocations, or professions whatever"; and "finally, to pass all such ordinances, not inconsistent with the provisions of the charter or the law of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same": *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 628; 9 Am. St. Rep. 370.

As telephones are used by all classes of persons for business purposes, some legal effect must be given to conversations held over them; and to the existence of this legal effect it is essential that such conversations should, at least under some circumstances, be receivable in evidence. It is true that many objections to their reception exist. The person talking cannot be seen, nor is there any method of authenticating and preserving for future reference what he says. Yet where both parties resort to this method of communication, they must intend that some legal result shall follow. If they are not willing to assume the risks incident to the mode, they should decline to resort to it, or to permit others to communicate with them in that way. If the person receiving the message can recognize the voice of the sender, or testifies that he recognized it, there is but little objection to his being permitted to state the contents of the communication thus received: *People v. Ward*, 3 N. Y. Crim. R. 483, 511. If the voice is not recognized, but the conversation is held through a telephone kept in a business house or office, it is also admissible. "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as parts of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible": *Wolfe v. Missouri Pacific R'y Co.*, 97 Mo. 473; *post*, p. 331. The one to whom the message is sent may not be in direct communication with the telephone. The conversation may be conducted by an operator in charge of a public telephone station; in which event, as the message does not personally concern the operator, he will rarely remember its contents. In such a case it has been held, by a divided court, that the conversation was admissible in evidence, and that the person receiving the message may state its contents as detailed to him by the operator at the time, when it appears from other evidence that the person against whom the evidence was offered did in fact talk over the wire at that time. "When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and in such a case, certainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes

to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence": *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901.

In *Banning v. Banning*, Sup. Ct. Cal., September, 1889, an acknowledgment of a deed by a married woman was sought to be avoided on the ground that she was at the time the notary took such acknowledgment three miles distant from him, and communicated with him and he with her by telephone only. But the court disposed of the question as follows: "It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily and without the hearing of her husband acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception was practiced to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone. These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake." The court then proceeded to consider the authorities bearing upon the question whether a certificate of the acknowledgment of a deed by a married woman can be contradicted collaterally; and having reached the conclusion that such certificate could not be successfully assailed otherwise than by proving fraud, sustained the deed and acknowledgment in question. Hence while the court expressly withheld its opinion upon the question whether an acknowledgment by telephone is good "under any circumstances," the inevitable logical result of its decision is, that such acknowledgment, followed by a certificate in due form, is good under all circumstances, unless vitiated by fraud.

PENNSYLVANIA COMPANY v. STEGEMEIER.

[118 INDIANA, 805.]

DEMURRER TO PLAINTIFF'S EVIDENCE ADMITS the truth of all the evidence adduced by him, and all inferences that may be reasonably drawn therefrom, and withdraws from consideration all favorable evidence except upon points where there was no conflict.

ORDINANCE OF A MUNICIPAL CORPORATION REQUIRING A RAILWAY CORPORATION TO KEEP A FLAG-MAN to give warning to travelers at the crossing of its railroad track on a designated street, and to have gates erected at such crossing, is a valid local law.

CONTRIBUTORY NEGLIGENCE IN CROSSING RAILWAY—WHAT EXONERATES PERSON INJURED FROM CHARGE OF. — One who reaches a railway crossing in a city at which the railway company is required by municipal

ordinance to keep a flag-man to warn persons of impending danger, and to have gates by which such crossing is to be closed when trains are passing, and who finds the gates open and no flag-man in sight, is justified in the belief that no trains are about to pass, and is not guilty of contributory negligence in attempting to travel upon such crossing.

CONTRIBUTORY NEGLIGENCE—ONE BROUGHT INTO DANGER BY THE WRONG OF ANOTHER is not bound when confronted by sudden and unexpected peril to act with coolness and deliberation. Hence where a man went upon a railroad crossing when the local law and the custom of the railway company gave him assurance that the tracks were clear and the crossing safe, and he there found two trains rapidly approaching him on different tracks, and in opposite directions, and was struck by one of them, he cannot, as a matter of law, be adjudged guilty of such contributory negligence as bars recovery; for he was thrown off his guard, and exposed to a sudden danger that he had a right to expect would not be encountered.

J. Brackenridge and M. L. Graff, for the appellant.

H. Colerick, W. S. Oppenheim, and P. B. Colerick, for the appellee.

ELLIOTT, C. J. The appellee, in her complaint, alleges that the appellant was required by an ordinance of the city of Fort Wayne to keep a flag-man to give warning to travelers at the crossing of its railroad track and Hanna Street, a public street of that city; that it had erected gates at the crossing, and had stationed a flag-man there; that appellee's intestate went upon the crossing and was struck and killed by one of the appellant's trains; that the gates were open at the time, and the flag-man was in his shed; that no warning was given, and that the intestate was free from contributory negligence.

The appellant demurred to the evidence. The rules upon the subject of demurrers to the evidence are well settled, and by them this case must be determined. By demurring to the evidence, the appellant admitted the truth of all of the evidence adduced by the appellee, and all inferences that might reasonably be drawn from it, and withdrew from consideration all favorable evidence, except upon points where there was no conflict: *Palmer v. Chicago etc. R. R. Co.*, 112 Ind. 250, and cases cited. The question, therefore, as the record presents it, is this: Does the evidence, considering only that which is favorable to the appellee, and awarding her the benefit of all reasonable inferences for which it supplies a foundation, establish the cause of action stated in her complaint?

The appellee testified that she was the widow of the intestate.

tate, gave the names and ages of his children, stated his business, and the time of his death, and said that he was forty years of age. She also testified that he had lived in Fort Wayne for many years, not far from the crossing where he was killed. John Wingate testified that he saw the deceased running down Hanna Street about daylight on the morning of March 2, 1886, and that he saw him on the crossing, and saw also the head-light of an approaching train not more than six or eight feet distant from him. The witness then lost sight of the deceased, and after the train passed he saw the switchman come out of his shed, and walk back up the track, and he, the witness, joined him. They found the deceased lying not far from the track, and taking him up, they carried him to the sidewalk. Louis Deggetts testified that the name of the appellant's watchman at the Hanna Street crossing on the 2d of March, 1886, was Patrick Keith, and that at the time the appellant's train passed on that morning Keith was in his shed. Charles Newell, in his testimony, said that he was the engineer of the No. 5, or limited, train of the appellant; that the gates of the crossing were up when his train passed on the morning of the 2d of March. This witness also testified that he saw a man on the track looking up at a train, and that he gave three sharp blasts of the whistle; that he did not again see him, nor did he know that the man was hurt until some minutes afterwards, when he found a man's cap on his engine. The crossing was proved to be within the corporate limits of the city of Fort Wayne, and an ordinance of the city was given in evidence, which contained a provision requiring the appellant to keep a flag-man at the crossing of Hanna Street. It was also proved that train No. 5 passed that crossing about the time the appellee's intestate was struck, that the gates had been in use at the crossing for four or five years before the accident, and the manner in which they were operated was explained. It was admitted that the deceased was struck by train No. 5, and that it was one of the appellant's trains. There was also evidence showing that train No. 5 was moving west on the appellant's track, and that train No. 6, belonging to the Wabash company, was at almost the same instant moving to the east on a track a few feet distant from that on which the appellant's train was moving. These tracks were laid from east to west, and were crossed by Hanna Street, running north and south, at right angles.

The appellant's counsel say in argument that "it was the duty of the company to keep a flag-man at this crossing, and it was also the duty of the defendant to have the gates down when a train was passing over the crossing. The evidence shows that the flag-man was not at his post, and that the gates were not down when the train whose engine it was claimed killed the intestate was about to pass over the crossing. It may, therefore, on demurrer to the evidence, be assumed that the company was guilty of negligence." This statement of appellant's counsel narrows the investigation to a single question, and that is this: Is there evidence from which it may be reasonably inferred that the appellee's intestate was not guilty of contributory negligence?

The appellant's counsel, it is true, argue that there is no evidence that Stegemeier was struck by train No. 5, but in assuming that there was no such evidence counsel are in error, for it was expressly admitted on the trial "that the track that train No. 5 was running on at the time (the time of this accident) was the property of the defendant, and that the said train was operated by the Pennsylvania Company, the one that hit William Stegemeier."

The appellant was in the wrong in not obeying the ordinance of the city. This is, as we have seen, conceded by counsel, and there can be no doubt that the proposition we state embodies the law: *Wanless v. N. E. R'y Co.*, L. R. 6 Q. B. 481; L. R. 7 H. L. Cas. 12; *Railway Co. v. Schneider*, 45 Ohio St. 678; *Baker v. Pendergast*, 32 Id. 494; 30 Am. Rep. 620. An ordinance of a municipal corporation is a local law, and binds persons within the jurisdiction of the corporation: *Town of Elwood v. Citizens' Gas etc. Co.*, 114 Ind. 332; *Blanchard v. Bissell*, 11 Ohio St. 96; *State v. Lee*, 4 Crim. Law Mag. 79, 81; 1 Dillon on Municipal Corporations, 3d ed., sec. 307; *Madison etc. R. R. Co. v. Taffe*, 37 Ind. 361; *Pennsylvania Co. v. Hensil*, 70 Id. 569; 36 Am. Rep. 188; *Simons v. Gaynor*, 89 Ind. 165.

The effect of the appellant's failure to obey the local law extends much further than the question whether it was or was not guilty of actionable negligence, for it exerts an important influence upon the question whether the intestate was or was not guilty of contributory fault. The evidence shows that he was, and long had been, a citizen of Fort Wayne, and it also shows that he was acquainted with the Hanna Street crossing. The reasonable inference, therefore, is, that he knew that when

trains were about to pass the crossing, the gates were shut down, or warning given by the flag-man. But more than this, he had a right, within reasonable limits, to act upon the presumption that the company had done its duty, and obeyed the law. He had no right, however, to recklessly omit to use his senses of sight and hearing, and rely entirely upon this presumption; but he did have a right to presume that there were no approaching trains. But here there is no evidence that he did not use his senses as a prudent man would have done under the circumstances in which he was placed; on the contrary, there is evidence from which it may be reasonably inferred that he was not guilty of contributory negligence. It is a familiar rule that a man brought into danger by the wrong of another is not bound, when confronted by sudden and unexpected peril, to act with coolness and deliberation. The law recognizes the influence which unexpected exposure to danger exerts upon ordinary men, and does not demand of them the prudence and care that men would exercise under other circumstances: 2 Shearman and Redfield on Negligence, 4th ed., sec. 477. Here the failure of the company to obey the local law gave the deceased assurance that the tracks were clear and the crossing safe; but when he had gone upon the crossing he found two trains rapidly approaching him, one from the east and one from the west, and the fact that he met his death by being struck by one of them does not authorize the inference that he was guilty of such contributory negligence as bars a recovery, for he was thrown off his guard, and exposed to a sudden danger that he had a right to expect would not be encountered. If he had carelessly gone upon the track, or had gone upon the track at a crossing where there were no gate or no flag-man required, we should have a very different case; but he was not negligent in going upon the tracks, because he was justified in believing that there were no approaching trains. It was the act of the appellant, and not his own, which created this belief. It was through no fault of his that he entered a place of danger. The case at bar is to be discriminated from those in which the injured person enters upon a track where there is no affirmative assurance of safety, for here the fact that the gates were up, and no warning given by the flag-man, was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a

whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross, and of a declaration that there are no approaching trains. This essential feature clearly marks the case, and distinguishes it from such cases as *Chicago etc. R'y Co. v. Hedges*, 118 Ind. 5.

The case before us belongs to the class in which railroad companies are held responsible because they put the traveler off his guard, and lure him into danger. The general rule upon this subject is thus stated by one of our text-writers: "Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the necessity for looking or listening for the approach of a train, he cannot, as a matter of law, be said to be guilty of negligence *per se* for neglecting to do so. Thus where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross, and if the company neglects its usual duty, and does not close them, or otherwise notify travelers of the approach of a train, it cannot relieve itself from liability simply because the traveler neglected to look or listen for himself": 2 Wood on Railway Law, 1328.

It is said in another text-book that: "Yet, where a railroad company is under no original obligation to station a flag-man at a particular crossing, if it has done so for many years, travelers have a right to presume, in case of his absence, that the road is clear. So they have, where the company is legally bound to keep a man at the crossing, though the obligation be created only in favor of other persons": 2 Shearman and Redfield on Negligence, sec. 466.

In the case of *Railway Co. v. Schneider*, 45 Ohio St. 678, the supreme court of Ohio said: "It is the business of the gate-men to watch the track, and when clear, to open the gates for persons using the street to cross; and, upon the approach of locomotives or trains, to close the gates and prevent persons and vehicles from crossing until the tracks are again clear. To persons in the street who are approaching the railroad tracks with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross." It was said by Treat, J., in *Central Trust Co. v. Wabash etc. R'y Co.*, 27 Fed. Rep. 159, that: "At the crossings in a populous city,

where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchmen, that they can proceed with entire safety. If accidents should happen through the gross negligence of the management of the gates by the watchmen connected therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of the passenger or pedestrian in crossing, under such circumstances, cannot exonerate the railway company, whose duty it was to protect said crossing, and give warning as to the safety thereof." In *North Eastern R'y Co. v. Wanless*, L. R. 7 H. L. Cas. 12, L. R. 6 Q. B. D. 481, it was said: "It appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the fact that the gates were open. Then, when inside the gates, the boy, who in this case was injured, saw what was inconsistent with the gates being open, namely, he saw one train passing, and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train." The reasoning of the judge from whom we quote forcibly applies to this case. The deceased was not simply thrown off his guard, but he was also assured that there were no approaching trains, and this assurance dispensed with the vigilance that under other circumstances would have been required of him; this assurance, too, completely relieved him from the imputation of negligence in going upon the tracks, and the evidence of the approach of the trains from opposite directions an instant after he entered on the tracks, supplies sufficient ground for the inference that his failure to see and avoid the train was attributable to the confusion produced by the sudden peril to which the wrong of the company had inexcusably exposed him. There are many decisions supporting the doctrine we have asserted, but we deem it necessary to cite only a few of them: *Chicago etc. R. R. Co. v. Boggs*, 101 Ind. 522; *Greany v. Long Island R. R. Co.*, 101 N. Y. 419; *Owen v. Hudson etc. R. R. Co.*, 35 Id. 516; *Beisiegel v. New York etc. R. R. Co.*, 34

Id. 622; 90 Am. Dec. 741; *Dolan v. Delaware etc. Canal Co.*, 71 N. Y. 285; *Chicago etc. R. R. Co. v. Hutchinson*, 120 Ill. 587.

Judgment affirmed.

DEMURRERS ADMIT ALL MATERIAL FACTS WELL PLEADED, AND ALL NECESSARY inferences from such facts, but all facts not alleged in the pleading attacked by demurrer, or necessarily inferable therefrom, are assumed not to exist: *Supply Ditch Co. v. Elliot*, 10 Col. 327; 3 Am. St. Rep. 586, and note 594; *Twohey v. Fruin*, 96 Mo. 104.

ACTS OF ONE SURPRISED BY SUDDEN DANGER. — The law does not require that a person who is surprised and confused by a sudden danger should act or be judged according to any strict or fixed rule: *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 879.

STATE EX REL. HOVEY v. NOBLE.

[118 INDIANA, 350.]

THE COURTS POSSESS THE ENTIRE BODY OF THE INTRINSIC JUDICIAL POWER OF THE STATE, and the other departments are prohibited from assuming to exercise any part of that judicial power.

CONSTITUTIONAL LAW. — THE POWERS OF THE THREE DEPARTMENTS OF GOVERNMENT are not merely equal, — they are exclusive in respect to the duties assigned to each, and each is absolutely independent of the other.

CONSTITUTIONAL LAW. — NEITHER THE EXECUTIVE NOR THE LEGISLATURE CAN SELECT PERSONS TO ASSIST COURTS in the performance of their judicial duties. A department without the power to select those to whom it must intrust part of its essential duties cannot be independent.

THE POWER TO APPOINT THE MINISTERS AND THE ASSISTANTS OF THE JUDGES IS A JUDICIAL POWER, and was a judicial power when the present constitution was adopted.

JUDICIAL POWER, WHAT IS. — Whenever a power is conferred upon a court of justice, to be exercised by it as a court in the manner and with the formalities used in its ordinary proceedings, the action of such court must be regarded as judicial, irrespective of the original nature of the power.

THE SUPREME COURT MUST DECIDE FOR ITSELF ALL QUESTIONS of law and of fact. The facts must be gathered from the record by the court itself, and cannot be obtained through any other source, or by any other persons than the judges.

JUDICIAL OFFICES MUST BE EXERCISED IN PERSON. — A judge cannot delegate his authority to another; nor can the legislature or any other power delegate it for him.

THE JUDICIAL POWER OF THE STATE IS VESTED IN COURTS, NOT IN OFFICERS; and judicial duties cannot be assigned to persons who do not constitute a court.

A DEPUTY JUDGE IS A THING UNHEARD OF IN JURISPRUDENCE, and unknown to the constitution.

LEGISLATURE CANNOT CONFER JUDICIAL POWER upon any person or tribunal, for all judicial power comes from the constitution, and is by it vested in courts and judges.

CONSTITUTIONAL LAW. — STATUTE PROVIDING FOR THE APPOINTMENT OF COMMISSIONERS OF THE SUPREME COURT to assist that court in the performance of its duties, to hold office for the term of four years, and until their successors are elected and qualified, and to perform such work as the supreme court shall assign or appoint, but in no event to be binding or conclusive upon the supreme court, is unconstitutional, because it is an attempt to confer judicial functions upon such commissioners, when the entire judicial power of the state has, by the constitution, been vested in certain courts.

L. T. Michener, attorney-general, A. C. Harris, W. H. Calkins, F. Winter, and J. H. Gillett, for the relator.

W. P. Fishback, W. E. Niblack, J. R. Coffroth, J. D. New, R. Lowry, and M. Nye, for the respondents.

ELLIOTT, C. J. This action brings before us for judgment the constitutionality of the act of the general assembly, entitled "An act providing for the appointment of commissioners of the supreme court, and concerning matters connected therewith, and declaring an emergency": Acts of 1889, p. 41. The first section of the act assumes to create the offices of commissioners of the supreme court, and to provide for the appointment of persons to fill them by the general assembly. One clause of this section reads thus: "It shall be the duty of such commissioners, under such rules and regulations as the supreme court shall adopt, to aid and assist that court in the performance of its duties." Another clause declares that the "commissioners shall respectively hold their offices for the term of four years, and until their successors are elected and qualified." It is also provided in this section that "if a vacancy shall occur in any one of said commissionerships hereby provided for, during a recess of the general assembly, the governor shall appoint some properly qualified person to fill said office until the next session of the general assembly." It is also provided in the first section that "they shall each receive a salary equal to that of a judge of the supreme court." The second section enacts that "the duties to be done and the work to be performed by such commissioners shall be such as the supreme court shall assign or appoint; but in no event shall such duties and work be in any way binding or conclusive upon the said supreme court." Section 3 directs that rooms and stationery shall be provided for the commissioners. The fourth section requires the librarian to

furnish them with "such books as may be required for their convenient and ready reference." Section 5 reads thus: "Such commissioners shall be authorized to appoint a messenger, at a salary of six hundred dollars per year, and such other assistants as they may deem necessary for the convenient and expeditious performance of their duties." Section 6 makes an appropriation "to meet the payments required by the provisions of this act."

Section 1 of article 7 of the constitution vests the judicial power of the commonwealth in the courts. It ordains that "the judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." The effect of this provision is to vest in the courts the whole element of sovereignty known as the judicial, established by the constitution and the laws enacted under it, except in a few instances, where powers of a judicial nature are expressly and specifically lodged elsewhere: *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 463; 52 Am. Rep. 49. One element only of the three which compose our governmental system is vested in the courts; but to no other department is more than one element given. Each of the three departments has all there is of the element assigned it; but it has nothing more. Each department has, it is true, incidental rights of a nature intrinsically different from the body of the power distributed to it; but these incidental rights are such only as are necessary to enable it to perform its functions as an independent branch of the government, and are, in fact, part of the principal power itself. Of the element of sovereignty, which is exclusively and intrinsically judicial, the people gave the courts all they had to give.

The domain of the judiciary is not so extensive as that of the other departments; but no other power can enter that domain without a violation of the constitution, for within it the power of the judiciary is dominant and exclusive. The element of governmental power given to the judiciary is almost unfettered. Of all the enumerated departments of the government,—and ours is, from the foundation upward, a government of enumerated and distributed departments,—the judicial is the least trammelled by constitutional limitations. Less extensive than others, it is freer from restraints. Few limitations circumscribe its powers, and fewer restrictions trammel its functions. It is true that the judicial depart-

ment is not absolutely supreme; outside of its sphere it is, indeed, without power; but no one of the departments is supreme in the strict sense, for the supreme power is in the people.

No one department has, or can have, until the people shall change their organic law, all the powers of government; for those powers are carefully divided and clearly distributed. To affirm the contrary is to assert that all of section 7 is a collection of meaningless words, and every word of article 3 without meaning. But written constitutions are the product of deliberate thought. Words are hammered and crystallized into strength, and if ever there is power in words, it is in the words of a written constitution. Behind the words is the power of a free people operating through the medium of a constitutional convention, called together for the purpose of framing a fundamental and inviolable system of government. Of all governmental instruments it is the most solemn and powerful. Its grants are unalterable, its delegations of power unchangeable, and its commands supreme. Until the people themselves shall change or annul their constitution, all must obey its mandates. "All power," says the first section of our bill of rights, "is inherent in the people." Our constitution, therefore, is one in which "the people are recognized as the fountain of all law and authority, and a large proportion of the citizens, determined by the sovereign body, exercise the powers of government by representation": Jameson on Constitutional Convention, sec. 70. In the legislative department the sovereign body is represented by the general assembly, in the executive department it is represented by executive and administrative officers, and in the judicial department it is represented by the courts. "The powers of the government," ordains our constitution, "are divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided": Const., art. 3. The words employed are clear and strong. There is more than a mere theoretical separation, or else words are powerless and constitutions mere empty fulminations. The provisions of the constitution we have quoted, taken in connection with those which prescribe, define, and limit the powers of the other departments of government, remove all doubt, and make it

incontrovertibly plain that the courts possess the entire body of the intrinsic judicial power of the state, and that the other departments are prohibited from assuming to exercise any part of that judicial power.

The authorities sustain our conclusion, for there is neither conflict nor clash of opinion, nor is there even diversity. The difficulty is not to find authority, but to select cases which best express the universal doctrine that all judicial power is exclusively in the courts, and that the departments of government are absolutely separate and distinct. Said the supreme court of Nebraska: "The powers of the state government are divided into three distinct departments,—the legislative, executive, and judicial; and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the constitution. Under this division of distinct departments of the government, the apportionment of power to one department will of itself imply an inhibition of its exercise by the others": *Turner v. Althaus*, 6 Neb. 54. One of the greatest of American judges, Gibson, C. J., said: "But the judicial power of the commonwealth is its whole judicial power; and it is so distributed that the legislature cannot exercise any part of it": *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567. "Does any one suppose," says the supreme court of Illinois, "that this state can rightfully confer judicial power on any other courts than those provided for and created under our fundamental law?" At another place in the same opinion it is said, in speaking of a section of the constitution of Illinois: "This section has exhausted the judicial power of the people of the state. It is there fully disposed of, leaving no residuum": *Missouri River Tel. Co. v. National Bank*, 74 Ill. 217. "If there is any one proposition immutably established," said Sawyer, J., "I had supposed it to be that the judiciary department is absolutely independent of the other departments of the government": *In re Pacific R'y Com.*, 32 Fed. Rep. 241, 267. In speaking of constitutional courts, the supreme court of Alabama said: "These judicial tribunals are established by the constitution, owe their existence to that instrument alone, and are in no wise dependent upon the act of the general assembly." It was also said in the same case, in speaking of the courts, that "some are established by the constitution itself,—that is, by the people. They do not depend on legislative enactment for

existence. They are created at the same time and in the same way with the legislature itself. They are of the same grade in the sovereign power. They are a constituent branch of the government itself. The government under the constitution is not complete without them": *Perkins v. Corbin*, 45 Ala. 103; 6 Am. Rep. 698.

This court has ever been consistent and firm in maintaining the independence of the judiciary, and in enforcing the provisions of the constitution which distribute the governmental powers. In *Wright v. Defrees*, 8 Ind. 298, it was said: "The powers of the three departments are not merely equal,—they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other." The court said, in the case of *Lafayette etc. R. R. Co. v. Geiger*, 34 Id. 185, 197, that "these departments of government are equal, co-ordinate, and independent." This doctrine has been asserted and enforced again and again: *Kuntz v. Sumption*, 117 Id. 1; *Smythe v. Boswell*, 117 Id. 365, and cases cited; *Ex parte Griffiths*, 118 Id. 83, and cases cited; *Smith v. Myers*, 109 Id. 1; 58 Am. Rep. 375. This court has not only maintained the independence of the judiciary, but it has with equal firmness and consistency asserted the independence of the other departments. In *Butler v. State*, 97 Ind. 373, we held that the courts could not suspend a sentence, because the power to grant pardons and respites was vested in the executive; and in cases much too numerous for citation it has been held that the court will neither perform a legislative act nor assume to interfere with matters of governmental policy or expediency. But it is not the courts alone that assert these doctrines; they are found in the works of every philosophical writer on government: Lieber on Civil Liberty, 154; Montesquieu on Spirit of Laws, 33; Ingersoll on Fears for Democracy, 23; Wilson on Congressional Government, 12, 36; 1 Bryce's Am. Com. 31; 3 Burke's Works, 110.

We have, perhaps, devoted more time than is necessary to discussing and illustrating the proposition that the judiciary is an independent department of the government, and that the whole judicial power of the state is exclusively vested in the courts, since the proposition is one that neither lawyer nor publicist will challenge; but the importance of the proposition supplies an apology, if, indeed, apology be needed. The principle embodied in our proposition controls many phases of the case. Among other conclusions to which it leads is this cen-

tral and ruling one: Neither the executive nor the legislative can select persons to assist the courts in the performance of their judicial duties. Grant—and this cannot be granted save for mere argument's sake—that it is true that the act before us contemplates that the commissioners shall be mere assistants of the court, occupying, as is so earnestly and at so much length insisted, positions analogous to those of master commissioners or masters in chancery, and it must follow that such assistants shall be selected by the court, and that neither the governor nor the legislature can choose them for the court. From this conclusion there is no escape save by a denial of the independence of the judiciary and an overthrow of the fundamental principle that the whole judicial power of the commonwealth is in the courts.

A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. If it must accept as "ministers and assistants," as Lord Bacon calls them, persons selected for them by another department, then it is dependent on the department which makes the selection. To be independent, the power of the judiciary must be exclusive, and exclusive it cannot be if the legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants to share with the governing power its functions and duties, the latter kingdom is in no sense independent.

If it be conceded that the right to make choice of ministers and assistants for the court is a legislative power, then neither the judiciary nor the executive can limit its exercise, nor impose restraints upon the legislative discretion. Do but grant the existence of the power, then the extent and the mode of its exercise are, and must necessarily be, entirely matters for legislative determination. If this be so, then the legislature may select any number of assistants, assign to them whatsoever duties they may see fit, give them access to the records of the court, and surrender to them the right to share with it all labors and all duties. Surely, a court thus subject to legislative rule would be a mere dependent, without a right to control its own business and records. But a constitutional court is not subject to any such legislative control. The legislature cannot for any purpose cross the line which separates the departments and secures the independence of the judiciary. It is not the length of the step inside the sphere of the judiciary

that summons the courts to assert their constitutional right and demands of them the performance of their sworn duty, for the slightest encroachment is a wrong to be at once condemned and resisted. As Daniel Webster said, and Mr. Calhoun substantially repeats, the "encroachment must be resisted at the first steps." A thoughtful English writer, who has studied our governmental treatises and judicial decisions with great care, and who has calmly surveyed the subject from the point of view of a disinterested and impartial observer, says, in speaking of our state constitutions, that: "But in America, a legislature is a legislature, and nothing more. The same instrument which creates it creates also the executive, governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual": 1 Bryce's Am. Com. 429.

The principle that it is the right of the courts to select their own assistants was held to extend to the appointments of janitors by the supreme court of Wisconsin: *In re Janitor*, 35 Wis. 410. The supreme court of Missouri has held that the exclusive power of the legislative courts does not go to that extent, but it does not deny the general right of the courts to select those who share its duties as ministers and assistants: *State v. Smith*, 82 Mo. 51. The court of appeals, in a strongly reasoned case, declared a different doctrine, holding that the court had a right to select its janitor; and that court supported its decision by authority and by weighty arguments: *State v. Smith*, 15 Mo. App. 412. But conceding the soundness of the decision in *State v. Smith*, *supra*, it must still be affirmed that it is not applicable here, for that decision proceeds entirely upon the ground that the criminal court (the court which asserted the right to appoint a janitor) was a statutory tribunal, and not a constitutional court. The decision in *Commissioners v. Hall*, 7 Watts, 290, in principle strongly supports the judgment of the court of appeals, as does the decision in *State v. Smith*, 5 Mo. App. 427. But the case before us does not require us to do more than affirm that where assistants are necessary to enable judges to discharge their duties as judges the court must choose those assistants. Since the time of Queen Elizabeth, courts have appointed masters in chancery,

and masters in chancery and master commissioners now are, and have always been, appointed by the federal courts. Our own law has from the earliest years of the state recognized, as it does still, the right of the judiciary to select masters in chancery and master commissioners. The acts of 1881 and 1883, under which commissioners for this court were appointed, expressly recognized this right as one vested in the courts. If practical exposition of a constitution is ever of force,—and no one will deny its force,—it is here of controlling effect, for the practice has been uniform and unbroken for centuries before the adoption of the constitution, and for all the years that have followed its adoption, courts have possessed and exercised, as part of the judicial power, the right to select assistants.

Proceeding still further upon the concession which we have provisionally made,—and made simply for argument's sake,—we affirm that the power to appoint the “ministers and assistants” of the judges is a judicial power, and was a judicial power when the constitution was adopted. We assert, as a conclusion necessarily following from the proposition we have affirmed, that when the framers of the constitution declared that the judicial power was vested in the courts, they invested this power in the judiciary as it then existed, and that this investment conferred upon the courts the exclusive power to choose their own ministers and assistants. We suppose no one will deny that the courts, from the earliest ages of the law, have possessed the power to appoint referees, receivers, commissioners, and all other like ministers or assistants, and that they possessed this power because it was a judicial power. If it was not a judicial power, it could not have resided in the courts, for courts have no other power.

It is a mistake to suppose that a court possesses merely the power to hear and decide causes. The power is much more extensive. Bouvier thus defines judicial power: “Belonging to or emanating from a judge as such; the authority vested in a judge.” Webster’s definition of the word “judicial” is this: “Pertaining to courts of justice, as judicial power,” and, “proceeding from a court of justice, as a judicial determination.” Speaking of these definitions, the court of appeals of New York said: “Whatever emanates from a judge, as such, or proceeds from courts of justice, is, according to these authorities, judicial”: *In the Matter of Cooper*, 22 N. Y. 67, 82. In the case of *Striker v. Kelly*, 2 Denio, 323, it was said, in

answer to an objection that courts could not exercise the power of appointing commissioners: "It might be objected with equal plausibility that the appointment of referees was an executive and not a judicial act." "The principle to be deduced from these extracts," says the court of appeals of New York, "obviously is, that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power." At another place in the same opinion it is said: "Attorneys and counselors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may with propriety be intrusted to the courts; and the latter, in performing this duty, may very justly be considered as engaged in the exercise of their appropriate judicial functions": *In the Matter of Cooper, supra*. It is, however, unnecessary to multiply authorities; for it cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners.

In employing the term "the judicial power," the constitution refers to the power as it then existed. Constitutions do not create institutions, but are formed by organized society, and refer to the existing condition of affairs: Cooley on Constitutional Limitations, 5th ed., 47; *Durham v. State*, 117 Ind. 477. A constitution, says Judge Cooley, "assumes the existence of a well-understood system which is still to remain in force and be administered": Cooley on Constitutional Limitations, 5th ed., 73. Our constitution, therefore, assumes that "a judicial power" was already in existence, and refers to the power as it then existed. It means the power which the people understood to be vested in judges, for no other power is judicial. As the judicial power embraced the authority to select "ministers and assistants" at the time the constitution was adopted, that right was sanctioned and confirmed; for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well-known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assist-

ants, and the constitution has secured and confirmed that principle beyond the power of the legislature to shake it. As Webster says: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former."

Counsel for the defendants refer us to the case of *Taylor v. Commonwealth*, 3 J. J. Marsh. 401, where it is held that the appointment to office is intrinsically an executive function. Other courts have asserted a like doctrine. Thus it was said in *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, that "appointments to office, by whomsoever made, are intrinsically executive acts." But if we were to accept this doctrine as correct, and give it full application, then it would completely destroy the claim of the defendants; for if the right to appoint can never be anything else than an executive act, the attempt of the legislature to appoint the claimants was utterly abortive. But we do not understand the authorities to assert that the selection of officers is always an executive act; on the contrary, the authorities hold that, while the power is intrinsically executive, it may be exercised by a court or by a legislative body as an incidental power of an independent department of the government. No one would, we confidently assume, be so bold as to assert that the legislature may not appoint officers connected with its duties and proceedings, and there is no more reason for denying the power to the courts than there is of denying it to the legislature. The truth is, that all independent departments have some appointing power, as an incident of the principal power, for without it no department can be independent; *State v. Barbour, supra; Achley's Case*, 4 Abb. Pr. 35. We are not here dealing with the general power to appoint, but we are dealing with a single phase of the general question, and we do no more than affirm that each department must have, and does have, some appointing power, and that where an appointment is essential to the proper exercise of a judicial duty, the court concerned has authority to make the appointment. If this be not true, then no court can appoint a guardian, an administrator, a receiver, a referee, an appraiser, or a commissioner. It is, in truth, impossible to conceive of the existence of an independent judicial department without the power to make some appointments. The denial of this incidental power is the annihilation of judicial independence.

Thus far we have proceeded upon the theory, and it is the

one most earnestly pressed by counsel, that the commissioners are mere assistants of the court, and we have shown that, even on that theory, which, for argument's sake, we provisionally conceded to be correct, the act is clearly and undoubtedly unconstitutional. We now deny the validity of the theory, and assert that the defendants have built upon an assumption that cannot be sustained.

The assumption that the supreme court can perform its judicial duties through the medium of masters in chancery or master commissioners, or persons charged with duties like those performed by masters in chancery and master commissioners, is without foundation. If it cannot thus perform judicial duties, it can perform none, for its duty and its power are exclusively judicial. The supreme court must decide for itself all questions of law and of fact. The facts must be gathered from the record by the court itself, and cannot be obtained from any other source or by any other persons than the judges. It is a court of errors,—an appellate tribunal,—charged with the duty of deciding cases upon the record, and this duty cannot be performed by deputies. Independently of any constitutional provision, this would be so, because judicial powers cannot be delegated. This principle has been established for ages. Chancellor Kent thus states this familiar rule: "The general rule is, that judicial offices must be exercised in person, and that a judge cannot delegate his authority to another. I do not know of any exception to this rule with us": 3 Kent's Com., 12th ed., 457; Broom's Legal Maxims, 841; *Campbell v. Board etc.*, 118 Ind. 119; *Hards v. Burton*, 79 Ill. 504.

Those who are chosen by the people to sit as judges must themselves discharge all the judicial duties of their offices. The trust is imposed upon them, and they cannot share their judicial duties with any person. The people have a right to the judgment of those whom they have made judges, and this right the judges cannot surrender, if they would, without a flagrant breach of a sworn duty. The trust is a personal one, inalienably invested in the persons selected by the people, and it cannot be delegated by the judges themselves, nor by any one else for them. "It is only the appointed judge," says Chief Justice Ryan, "who can speak the authoritative word of the law": *Van Slyke v. Trempealeau etc.*, 39 Wis. 390; 20 Am. Rep. 50. But centuries before, and at a time when the king was the fountain of judicial power theoretically, and sat

in the courts of law and equity, Sir Edward Coke even more emphatically stated the rule. Said that "gladsome light" of jurisprudence, "the judicature only belongeth to the judges": 4 Inst. 73. Matthew Bacon said: "The king himself, though he be intrusted with the whole executive power of the law, cannot sit in judgment in any court but his justice and the laws must be administered according to the power committed to and distributed among his several courts of justice": 2 Bac. Abr. 619. Again we quote from this high authority, who, speaking of the judges, says: "They cannot act by deputy, nor any way transfer their power to another": 2 Id. 620.

The theory of our governmental system as embodied in our constitution requires that the persons to whom the people have intrusted the judicial power shall themselves exercise it, and not intrust its exercise to others. Our constitution expressly so ordains. Its words are these: "The supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon": Const., art. 7, sec. 5. The decision must be that of the court, and so must be the statement upon each question "and the decision thereon." The power of deciding, the duty of deciding, and the duty of writing the opinions are specifically imposed upon the court. A duty imposed upon a department of government must be performed by the chosen officers of that department, and it can neither be delegated nor surrendered: Cooley on Constitutional Limitations, 5th ed., 116, 139. Where a specific duty is imposed upon a tribunal, by that tribunal it must be performed, without calling any one to perform it or assist in its performance: *Conroe v. Bull*, 7 Wis. 354; *Kearns v. Thomas*, 37 Id. 118; *Attorney-General v. McDonald*, 3 Id. 703.

We know judicially that our constitution was so amended as to invest the legislature with power to create courts superior to the circuit courts, and that this was done for the purpose of enabling litigants to have appeals disposed of by a constitutional tribunal. It cannot be unknown to any one that all the departments of the government believed that the only method of administering the laws was by courts created under the provisions of the constitution, and this belief the people confirmed by their votes in favor of the constitutional amendment. This supplies strong reasons for holding, as we do, that no body not provided for by the constitution can exercise any part of the judicial power of the state.

In the last of the many briefs submitted in behalf of the defendants, it is said that "counsel fell into error — doubtless by inadvertence—in assuming that either the writer or any of his associates intimated anywhere in any of their briefs that the legislature may have contemplated the performance by them, or that they might be assigned by the court to the performance, of any other duties than such as are similar to those which were performed by the members of the former commissioners of this court." Without stopping to quote from the briefs the portions (and many pages are devoted to establishing the proposition) which assert that the commissioners are to be assistants of the court, with powers analogous to those of master commissioners, we declare that, whatever view be taken, the act is utterly void; for it is, as we have shown, not within the power of the legislature to select assistants to share with the court its duties and functions, nor is it within the power of the legislature to delegate the duty of deciding cases or of giving decisions expression in writing to officers or tribunals unknown to the constitution.

It is apparent from what we have said that it is exceedingly difficult to give the act a definite and intelligent construction. None has been given it, and none can be given it that will sustain its validity. But this much is clear,—it assumes to create offices, to provide for the appointment of officers, and assumes to give to each of the officers a compensation equal to that of a judge of the highest court in the state. One of the sections—the fifth—assumes, indeed, to constitute the persons chosen an independent body, and to invest them with powers greater than those conferred upon the supreme court. The ultimate fact is, that the act assumes to create offices and invest the officers with judicial powers. The attempt, to vary somewhat our statement, although veiled and somewhat obscure, is to create a body with judicial power, and to invest officers with judicial rights and functions. The tribunal and the officers are unknown to the constitution. The attempt is unavailing; for it has been steadily held that, as said by Howk, J., in *Vandercook v. Williams*, 106 Ind. 345, "judicial officers only can exercise judicial powers or functions"; or, as said in other cases, "the judicial functions meant by the constitution are such only as courts and judges exercise. A judicial duty, within the meaning of the constitution, is such a duty as legitimately pertains to an officer in the department designated by the constitution as judicial. By this designa-

tion is meant the judiciary in the true sense of the term": *Wilkins v. State*, 113 Ind. 514; *Smythe v. Boswell*, 117 Id. 365, and cases cited; *Campbell v. Board etc.*, *supra*, and cases cited; *Wight v. Wallbaum*, 39 Ill. 555. Our constitution vests the judicial power of the state, not in officers, but in courts. In speaking of the constitutional provision, in *Waldo v. Wallace*, 12 Ind. 569, the court said: "It will be observed that the judicial power is vested in courts, not in officers." It is clear that the common law so vested it, and that the constitution there continues it: Cooley on Constitutional Limitations, 4th ed., 74. If the duties assumed to be assigned the commissioners are judicial, then they must constitute a court, since only courts can exercise judicial power; but as no such court is recognized by the constitution, it can have no legal existence. If, however, it be conceded that the tribunal which the act assumes to establish is a court, then the instant the act took effect the offices of the judges of that court were vacant: *Rice v. State*, 7 Ind. 332; *Driskill v. State*, 7 Id. 338; *Stocking v. State*, 7 Id. 326; *State v. Irwin*, 5 Nev. 111. If the act does establish a court, then its members are judges; and if judges, they must be appointed by the governor, and by no other power; for, as decided in the cases cited, the clause of section 18 of article 5 of the constitution, which reads thus: "Or when, at any time, a vacancy shall have occurred in any other state office, or in the office of a judge of any court, the governor shall fill such vacancy by appointment," — vests the appointing power in the governor. In two methods, and two only, can judges be chosen,—by the people and by the chief executive, and by the latter only where there is a vacancy. If the commissioners are judges, they have no title; if they are not judges, they can exercise no judicial powers or functions. But the act does not establish a court nor create judges; it is simply an attempt to appoint deputy judges, and a deputy judge is a thing unheard of in jurisprudence, and unknown to the constitution. A plan similar to the one which the act before us professes to outline was recently proposed to the bar of New York, and it was condemned as unconstitutional. The opinion of Mr. Moak, one of the leaders of the bar of the state, that "new officers not authorized" by the constitution "cannot be created," was accepted and adopted. In an editorial comment upon this proposed plan it was said: "All hands conceded to it to be unconstitutional when they came to think of it": 39 Alb. L. J. 257, 242.

The constitution vests the judicial power in every instance, and the legislature in none. The legislature has no judicial power, and can confer none upon any person or tribunal. Under the constitution it may establish courts, but it does not invest the courts with judicial power; the constitution alone can do that, for all judicial power comes from that instrument, and is vested by it in courts and judges. Speaking of the mayor of a city, the supreme court of Illinois said: "Unless he was such a judge, or a justice of the peace, no law could vest him with judicial powers, for in those officers alone is the entire judicial power of the state vested by the constitution. As mayor alone, the law would be as incompetent to vest him with judicial power as it would the governor or speaker of the house of representatives. The constitution itself has disposed of the entire judicial power of the state, and has exhausted that subject. The legislature may multiply some of the officers who are by the constitution vested with judicial powers, but when this is done, it is the constitution which vests the power": *People v. Maynard*, 14 Ill. 419. It is the constitution, and not the legislature, which makes the investiture, and it is the courts and judges who are invested with the judicial power: *Shoultz v. McPheeters*, 79 Ind. 373; *Gregory v. State*, 94 Id. 384; 48 Am. Rep. 162; *Little v. State*, 90 Ind. 338; 46 Am. Rep. 224; *Pressley v. Lamb*, 105 Ind. 171, and authorities cited, 185, 186; *Kuntz v. Sumption*, *supra*; *Smythe v. Boswell*, *supra*; *Campbell v. Board etc.*, *supra*; *Hall v. Marks*, 34 Ill. 358; *Ex parte Griffiths*, *supra*. As the constitution, of its own vigor, and as the sole source of the judicial power, vests that power in designated tribunals, the legislature can neither vest it elsewhere nor create new judicial offices, nor divide the duties of the judicial offices designated by the constitution. In *People v. Bolton*, 55 N. Y. 50, the principle stated by us was thus expressed: "The constitution cannot be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner, except as authorized by the constitution." In many other cases this doctrine has been asserted: *Warner v. People*, 2 Denio, 272; 43 Am. Dec. 740; *People v. Draper*, 15 N. Y. 532; *People v. Keeler*, 29 Hun, 175; *State v. Brunst*, 26 Wis. 412; 7 Am. Rep. 83; *King v. Hunter*, 65 N. C. 603; 6 Am. Rep. 754. Our constitution vests the highest appellate jurisdiction of the state in a supreme court,

and provides that the number of judges shall not be more than five; there can therefore be no other supreme court than the one established by the constitution, and it must be composed of five judges, and no more. There is consequently no such officer under the constitution as a supreme court commissioner, and there can be no division of the duties of the supreme court, and a distribution to any person other than the judges of that court, chosen as the constitution provides.

The people have a right to the courts established by and under the constitution, and this constitutional right the legislature can neither alter nor abridge. Constitutional tribunals cannot be changed by legislation, and the supreme court is a constitutional court. It can be composed of judges only; for only judges can constitute a court. No part of the judicial duties of that court can be assigned to any other person than one of the duly chosen judges. The legislature has no power to change its organization, nor can that body, under the guise of creating commissioners, divide the duties of the judges, nor authorize it to be done. Under our constitution as amended, the legislature may establish courts, but it cannot destroy the constitutional courts, — the circuit courts and the supreme court, — nor can it change their organization nor redistribute their powers, for these courts owe their organization to the constitution, and as the constitution has ordained that they shall be organized, so they shall be. Judicial power distributed by the constitution is beyond legislative control.

In discussing the general subject, the court of errors of New Jersey said, referring to constitutional provisions similar to our own, that: "In an examination of these sections the first thing which attracts attention is this: that the instrument itself establishes certain courts. It does not leave that all-important work to other hands. An omission in this respect in the constitution would have left the judicial system without any fixity whatever. In such a state of things, the powers, jurisdiction, and even the very existence of the several courts would have been placed under the control of the legislature. They could have been altered or abolished by that body at will. But the convention had no such purpose as this, and they therefore enumerated the superior tribunals in which was principally to reside the judicial power of the government. By that enumeration those tribunals became constitutional courts; that is, courts that could not be altered or abolished, except by an alteration of the instrument creating them. The

peculiar quality of a constitutional court, or of any other constitutional establishment, is this, that it is not susceptible of change in its fundamental principles, except in some prescribed mode. Thus, for example, the nature of this court, or the nature of the supreme court, cannot be altered in any way but one; that is, by a modification of the constitution itself. It is presumed that no professional gentleman would, for an instant, contend that the legislature could deprive the decrees and judgments of this court of their quality of being conclusive, or could take from the supreme court any of those prerogative writs by which inferior jurisdictions are superintended and regulated. The power to do this would involve the power to modify in essential particulars the constitution of these courts,—a power not to be distinguished from an authority to supersede or abolish. It is entirely clear that the legislature has not the competency to impair the essential nature or jurisdiction of any of the constitutional courts. To this extent, it seems to me, the subject is too plain for discussion": *Harris v. Vanderveer*, 21 N. J. Eq. 424. This doctrine finds support from many courts, but time will not allow us to quote at length from the many decisions, and we can do no more than refer to a few of them: *Hutkoff v. Demorest*, 103 N. Y. 377; *State v. Gannaway*, 16 Lea, 124; *Landers v. Staten Island R. R. Co.*, 53 N. Y. 450; *In Matter of Application of Senate*, 10 Minn. 78; *In Matter of Senate*, 9 Col. 623.

The question which faces us is not one of discretion, but of imperative duty. The duty of maintaining the separation of the departments of the government and the integrity and existence of the courts as established and organized by the constitution, is one of the most important that the judiciary is required to perform. It is the duty of the courts to uphold the constitution as it is written, and to yield no part of their right or authority. Judges are chosen for the purpose of maintaining the limitations of the constitution, without which free government cannot exist. As said by the court of appeals of New York: "If this provision were intended solely for the protection of the court or its judges, they might waive it; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the state, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies adjudged. The jurisdiction which the constitution preserves in the courts named is inalienable, and carries with it the corresponding

duty on the part of those courts to exercise it, when called upon in proper form to do so": *Alexander v. Bennett*, 60 N. Y. 204.

It is contended with much force, and the contention is well supported by authority, that the general assembly cannot delegate any of its functions, that the court can take upon itself no legislative duties, and that the act does require the court to prescribe by legislation the duties of the commissioners: *Smith v. Strother*, 68 Cal. 194; *In re School Law Manual*, 63 N. H. 574; *Gould v. Raymond*, 59 Id. 260; *In re Pacific Railway Commission*, 32 Fed. Rep. 241; *Ex parte Griffiths*, *supra*; *Smith v. Rines*, 2 Sum. 338; *Doe v. Considine*, 6 Wall. 458; Cooley on Principles of Constitutional Law, 53; Cooley on Constitutional Limitations, 139, 148; Endlich on Interpretation of Statutes, sec. 22. This question we do not deem it necessary to decide. It is clear to us that there is and can be no such offices as the legislature has assumed to create, and that the act is in all its parts utterly void.

The writ of prohibition prayed for will issue, and judgment will be entered in the relator's favor.

DEPARTMENTS OF GOVERNMENT. — Each department of the government, within its proper constitutional sphere, acts independently of both the others; neither can control or dictate to the other: *People v. Bissell*, 19 Ill. 229; 68 Am. Dec. 591; *Parsons v. Tuolumne Co. Water Co.*, 5 Cal. 43; 63 Am. Dec. 76; *Dennett, Petitioner*, 32 Me. 508; 54 Am. Dec. 602; *De Chastellux v. Fairchild*, 15 Pa. St. 18; 53 Am. Dec. 570.

JUDICIAL POWER. — The constitution vests the courts of justice with the sole judicial power and authority, and the legislature is prohibited from using or exercising such power: *Guy v. Hermance*, 5 Cal. 73; 63 Am. Dec. 85; *Menges v. Denler*, 33 Pa. St. 495; 75 Am. Dec. 616; *Hawkins v. Governor*, 1 Ark. 570; 33 Am. Dec. 346; *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499; *Lane v. Dorman*, 3 Scam. 238; 36 Am. Dec. 543; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567.

CRATER v. CRATER.

[118 INDIANA, 521.]

MARRIED WOMAN MAY MAINTAIN AN ACTION OF EJECTMENT AGAINST HER HUSBAND to recover possession of her separate estate.

MARRIED WOMAN COULD NOT MAKE A VALID CONTRACT WITH HER HUSBAND under the statute in force in 1866, that in consideration of his payment of certain claims or liens he should become a joint tenant with her of lands which then constituted her separate estate.

H. C. Dodge, for the appellant.

J. M. Vanfleet, for the appellee.

COFFEY, J. This was an action by the appellee against the appellant in the court below to recover the possession of the land described in the complaint.

The complaint does not differ from the ordinary complaint in ejectment, except in that it discloses the fact that appellant and appellee are husband and wife, living separate and apart from each other.

The appellant answered the complaint by a general denial. He also filed a counterclaim, in which he avers that he married the appellee in the year 1866; that at the time of such marriage there was a valid and subsisting claim against said land in favor of one David W. Fisk, amounting to the sum of six hundred dollars; that said land at said time was worth no more than nine hundred dollars; that appellee had no money or means of obtaining money with which to satisfy said demand, so a lien and encumbrance on said land, and to enable her longer to hold and maintain her title to the same, and was about to and would have wholly lost said land; that appellant was in possession of four hundred dollars, and at the earnest solicitation of the appellee, and upon her verbal promise to him that he should, if he would pay off said claim, be a joint owner with her in said land, he laid out and expended four hundred dollars, and gave his notes, which he subsequently paid, with his own money, for the balance of said claim so held by the said Fisk; that ever since the year 1866 appellant and appellee have lived together as husband and wife on said land until the — day of February, 1885; that during all said time he has paid all taxes and assessments against said land, amounting to five hundred dollars; that in 1866 said land was all uncleared wild land, and that appellant, by his own labor, has cleared up and reduced to cultivation all of said land, and has made all of the improvements thereon; that on the — day of February, 1885, while appellant was away from home, the appellee, without his knowledge or consent, and without any fault on his part, removed from the said land and the home of the appellant, and went to reside in the city of Elkhart; that appellant remained upon said land, living upon and farming the same to the time of filing this counterclaim; that he now is, and at all times has been, willing that appellee shall return to their said home and enjoy with him the use and benefit of said land. Prayer that he have such relief as he is in equity and good conscience entitled to receive in a court of equity.

A demurrer was sustained by the court to this paragraph, and the appellant excepted.

The cause was tried by a jury, resulting in a verdict for the appellee. Over a motion for a new trial the court rendered judgment on the verdict, and the appellant excepted. In this court, the appellant assigns as error: 1. That the court below erred in sustaining appellee's demurrer to appellant's second answer or counterclaim; 2. That the court erred in overruling appellant's motion for a new trial.

It is settled law in this state that the wife may sue the husband in relation to her separate property: *Wilkins v. Miller*, 9 Ind. 100; *Scott v. Scott*, 13 Id. 225. Under section 254, Revised Statutes of 1881, a married woman may sue alone,—1. When the action concerns her separate property; 2. When the action is between herself and husband.

By section 5116, Revised Statutes of 1881, it is declared that her lands, and the rents and profits therefrom, shall be her separate property as fully as if she were unmarried. And by section 5129, it is provided that all suits in relation to the wife's lands, if they be separated, shall be prosecuted in the name of the wife alone.

In New York, under statutes very similar to our own, it was held that the wife might maintain an action of ejectment against her husband for her separate real estate: *Wood v. Wood*, 83 N. Y. 575. It is our opinion that the wife, in this state, may maintain an action of ejectment against her husband to recover the possession of her separate real estate.

From the allegations in the appellant's counterclaim, we are left in some doubt as to the nature of the claim held by Fisk against the land of the appellee, but it is to be inferred that it was in the nature of a lien. As we understand the averments, there was a contract made between the appellant and the appellee, to the effect, that in consideration that appellant would pay off and discharge such claim, whatever its nature, the appellee would give him one half the land, to be held by them as joint tenants. The question is, Was that such a contract as the appellant can enforce against the appellee? And in deciding that question, reference must be had to the law in force in 1866, the time at which the contract was made. At the time the contract set up in the appellant's counterclaim was entered into, the following statute was in force:—

"Sec. 5. No lands of any married woman shall be liable for

the debts of her husband; but such lands, and the profits therefrom, shall be her separate property as fully as if she was unmarried; *provided*, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join": 1 R. S. 1876, p. 550.

It has frequently been held that, under the laws in force at that time, a married woman had no power to bind herself by contract: *Thomas v. Passage*, 54 Ind. 106; *Williams v. Wilbur*, 67 Id. 42; *American Ins. Co. v. Avery*, 60 Id. 566; *Hamar v. Medsker*, 60 Id. 413; *Behler v. Weyburn*, 59 Id. 143. The general rule is, that where a person in whose name a conveyance of property is taken is one for whom the party paying the purchase-money is under a natural or moral obligation to provide, no resulting or presumptive trust will arise, but the transaction will be regarded as an advancement for the benefit of the grantee under the conveyance. In the absence of the agreement set up in the counterclaim, such would be the presumption here.

This case, in its facts, is very much like the case in *Lochenour v. Lochenour*, 61 Ind. 595. In that case, Joseph Lochenour entered a tract of land in the name of his wife, and suffered the patent to issue in her name, under an agreement that she would hold it in trust for him. In that case, the court says that: "In the case at bar, the plaintiff was a married woman, the wife of the defendant, at the time the alleged declaration of an express trust was made by her. She was, therefore, then incapable of making such a declaration, or of becoming trustee for the defendant, in the manner set forth in the counterclaim under discussion." That case would seem to be decisive of the case now under consideration. It is true that the transaction reported in that case was had while the statute of 1838 was in force; but in 1866, married women were under the same legal disabilities as to contracts as in 1838. We do not think the circuit court erred in sustaining the demurrer of the appellee to the counterclaim now under consideration.

On the trial of the cause, the appellant offered to prove, substantially, the facts set up in his counterclaim, but upon objection of the appellee, the evidence was excluded. What we have said in relation to the counterclaim disposes of this question also. We find no error in the record for which the judgment of the court below should be reversed.

Judgment affirmed.

MARRIED WOMEN — SEPARATE ESTATE. — In equity, a married woman is regarded as a *feme sole* in respect to her separate property, and may dispose of it as she pleases, unless her power of disposition is restricted by the deed creating her interest: *Smith v. Thompson*, 2 McAr. 291; 29 Am. Rep. 621; *Dobbin v. Hubbard*, 17 Ark. 189; 65 Am. Dec. 425. In Colorado, a married woman is no longer *sub potestate viri*, as at common law, and she may sue and be sued, contract and be contracted with, as if she were a *feme sole*: *Hochstadter v. Hays*, 11 Col. 118. A married woman who has acquired an interest as tenant in common, under the statutes of New Jersey, may institute a suit for partition thereof without joining her husband: *Castner v. Slinker*, 43 N. J. Eq. 8.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE v. WESTERN IRRIGATING CANAL COMPANY.

[40 KANSAS, 96.]

CORPORATIONS. — IT IS NOT ESSENTIAL TO EXISTENCE OF CORPORATION that it should possess property, and its legal existence is not therefore necessarily terminated, although it may have conveyed all its property.

CORPORATIONS. — DULY INCORPORATED IRRIGATING COMPANY, HAVING POWER UNDER ITS CHARTER to construct and operate a canal for irrigation, water-works, and manufacturing purposes, may, with the assent of its stockholders, lawfully sell and convey to another irrigating company its right of way, canal, personal and real property, provided it is done in good faith, and not to delay or defraud creditors.

PROCEEDING in quo warranto. Action by the state, upon the relation of the attorney-general, against the Western Irrigating Canal Company, praying that the defendant be required to show by what authority it holds, possesses, and assumes to exercise the powers, privileges, and franchises granted to the Enterprise Irrigating Company; that the plaintiff have judgment of ouster against the defendant in the further exercise of such powers, privileges, and franchises; and that the defendant be declared by the judgment of the court to be incapable of exercising the same. At the trial a deed was offered in evidence by the plaintiff, showing that the Enterprise Irrigating Company sold, conveyed, and quitclaimed to the Western Irrigating Canal Company, for a valuable consideration, its right of way, together with its canal or ditch, and also all of its franchises, rights, interests, and property of every nature, kind, and description whatsoever. Other material facts appear in the opinion.

S. B. Bradford, attorney-general, and Waters, Chase, and Tiltonson, for the plaintiff.

J. F. Frankey, for the defendant.

HORTON, C. J. It is claimed that the Enterprise Irrigating Company, even if its stockholders desired it, had no right to sell all of its property, surrender its franchises, and terminate its existence without the assent of the state; therefore, that the Western Irrigating Canal Company could not exercise the powers, privileges, and franchises granted to the Enterprise company. For the purposes of this case, we assume this to be true, and that so much of the deed of December 11, 1886, as attempts to transfer and convey the franchises of the Enterprise company is wholly void; and yet we do not think the plaintiff is entitled to its judgment of ouster in this action. The Enterprise company was organized under the laws of the state, and had the power, during its existence as a corporation, "to hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation should require; . . . also to enter into any obligation or contract essential to the transaction of its ordinary affairs": Comp. Laws 1885, c. 23, sec. 11. See also the general provisions of chapter 23, Compiled Laws of 1885, relating to private corporations. The word "franchise" is generally used to designate a right or privilege conferred by law. What is called "the franchise of forming a corporation" is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this state have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise: 2 Morawetz on Private Corporations, sec. 923. Even if the Enterprise company had attempted so to do, it could not, we suppose, sell or convey its corporate name, or its right to maintain and defend judicial proceedings, or to make and use a common seal.

It is not essential to the existence of a corporation that it should possess property. Its legal existence, therefore, is not necessarily determined by the deed or its attempted conveyance. Its franchises remained, although the corporation may

have conveyed all its property. There is no stockholder or creditor intervening or objecting. Therefore we are not called upon to consider the rights of such parties. There is no complaint that the property of the Enterprise company was not properly acquired, and that the corporation legally owned it. The power to sell or dispose of the same necessarily attached as an incident to the ownership. If the corporation could convey a part, it could convey all, if its stockholders assented, and its creditors, if it had any, did not interfere or object. It may be that the business of the Enterprise company had proved unprofitable, and rendered it necessary to dispose of its property and wind up the concern, as the only means of avoiding insolvency. It may have been necessary to sell the whole of its property in order to raise means to pay its debts and avoid a sacrifice by forced sale. In either event, the sale and conveyance of the property with these objects in view would be a lawful purpose of the corporation: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191; *Town v. Bank*, 2 Doug. (Mich.) 530; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49; 35 Am. Dec. 292.

A private person could make a transfer of all his property if it was done *bona fide*. Now, the Enterprise company possessed all of the powers of a private person in regard to the disposition of its property. It had the absolute *jus disponendi*.

The route and profile of the Western Irrigating Canal Company is practically the same as that laid out and proposed by the Enterprise company. The Western company, under the statute, has full power to purchase and hold real and personal estate for the purposes of the corporation; therefore, the Western company was acting for the benefit of its stockholders when it purchased and took possession of the right of way of the Enterprise company, and in purchasing and taking possession of such property it was carrying out the purposes of its corporation. Under its charter, it had the power to excavate and construct an irrigating canal, commencing at some point in section 35, in township 27 south, of range 22 west, on the north bank of the Arkansas River, in Ford County, Kansas, with dam, and such lateral ditches as it deemed necessary for irrigation, water-works, and manufacturing purposes. Upon the agreed statement of facts and the evidence produced upon the trial, the Western canal company is only exercising the powers, privileges, and franchises conferred by its charter of

November 26, 1886. In taking possession of and in using the property purchased of the Enterprise company, it exercises its own rights and privileges.

Again, all of the franchises of the Enterprise company have been extinguished by the state, in an action brought in this court for that purpose. The estate has resumed its franchises, and that company is no longer in existence; therefore the Western canal company cannot exercise the powers, privileges, and franchises granted the Enterprise company, because they have been taken away by the state, and the latter company has no franchises to be exercised by any person or corporation.

Further, if the deed from the Enterprise company to the Western company transfers and conveys nothing, as it is alleged, then of course there is nothing to complain of. If the Western company has not obtained any right or title to the public domain over which its right of way is laid out, the state has no cause of action therefor.

Judgment will be rendered in favor of the defendant for all costs.

CORPORATIONS—RIGHT AND POWER TO TRANSFER ITS FRANCHISES AND PROPERTY: Extended note to *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 548-551.

CORPORATION ORGANIZED FOR THE PURPOSE OF OWNING DITCHES FOR CONVEYANCE AND SALE OF WATER HAS POWER to sell and convey all its corporate property, provided such sale is made for corporate and lawful purposes, and strangers taking a conveyance are entitled to assume, as against the corporation, that the sale was for a lawful purpose: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

STATE v. SEGERMOND.

[40 KANSAS, 107.]

CRIMINAL LAW.—IT IS POLICY OF CRIMINAL LAW TO SO CHARGE OFFENSE that if the defendant is acquitted he can the more easily plead and show such acquittal, if again charged with the same offense. This practice does not leave it to conjecture alone to determine whether such charge be identical with some former one, on which an acquittal has been had, but it must be specific to be available.

CRIMINAL LAW—ROBBERY.—INFORMATION FOR ROBBERY DESCRIBING the property taken as "twenty-five dollars in money, the said money then and there being the property of the said John Bond," but not alleging its value, or that it was of any value, or giving any excuse for the want of a more particular description, is fatally defective, and insufficient to sustain a judgment of conviction.

R. A. Cameron, for the appellant.

S. B. Bradford, attorney-general, for the state.

CLOGSTON, C. The defendant, Fred Segermond, was convicted of robbery, and sentenced to hard labor in the penitentiary of this state for a term of ten years, from which judgment he appeals to this court. The record contains the information, the bill of exceptions, saving exceptions to the overruling of an objection to the introduction of any evidence under the information, the instructions of the court to the jury, the verdict of the jury, the motion for new trial and in arrest of judgment, and the judgment on the verdict of guilty as charged. No exceptions are shown to the overruling of the motion for a new trial or in arrest of judgment, and for this reason it is contended that nothing is brought here for review. Before a defendant can complain of the ruling of the court upon the trial, exceptions must be saved by a bill of exceptions, and a motion for a new trial or in arrest of judgment, with the ruling of the court and exceptions thereto. This not having been done, there is nothing left for our consideration except the transcript of the record, and this presents only the one question: Did the information sufficiently and definitely state the offense of robbery to support the judgment of conviction? The charging part of the information complained of is as follows:—

“One Fred Segermond did then and there unlawfully, feloniously, purposely, and viciously assault the person of one John Bond, for the purpose and with the intent to, and did, then and there, rob the said John Bond of his personal property; and the said Fred Segermond did then and there, by putting him, the said John Bond, in fear of immediate injury, and by force and violence to his person, and in his, John Bond’s, presence, and against his will, did unlawfully and feloniously and forcibly rob and take from the person of said John Bond twenty-five dollars in money, the said money then and there being the property of the said John Bond.”

The objection urged against this information is, that it does not specifically and clearly describe the property taken; and second, that it does not allege that it was of value. Objections of this kind, coming after judgment, where no attack is shown to have been made in the court below, must be considered in a different light here than as if such objections had been properly made at the trial; and if on examination it can

be seen that the information was sufficiently explicit,—1. To enable the court to say that, admitting the facts, it had jurisdiction; 2. To apprise the defendant of the nature of the offense charged, so as to give him an opportunity to make his defense; and 3. To make the judgment certain and available as a bar to any subsequent prosecution for the same offense; or, in other words, the information must be so defective as not to sustain the judgment of conviction.

It will be seen that the information charges the property taken as "twenty-five dollars in money." Now, robbery is defined to be "larceny committed by violence of the person of one put in fear": 2 Bishop's Criminal Law, 7th ed., sec. 1156. And to constitute a larceny, the property stolen must be described so that the defendant may know what particular property or thing of the larceny of which he stands charged. The inquiry turns to the charge, "twenty-five dollars in money." Of what did this money consist? Was it in one piece, or in many? bills, or coin? treasury notes, or part of one denomination and part of another? These questions would be suggested to the mind of the person charged with the offense of robbery or larceny. Now, the law presumes the defendant to be innocent of the offense charged. To hold that this description of the property sufficiently notifies him of the nature of such charge, must presume his guilt, and presumes from that fact that he had a knowledge of just what kind of money was intended to be charged and was charged against him. It is the policy of the criminal law to so charge an offense that if the defendant is acquitted he can the more easily plead and show such acquittal, if again charged with the same offense. And this practice does not leave it to conjecture alone to determine whether such charge be identical with some former one, on which an acquittal has been had, but it must be specific to be available: *State v. Tilney*, 38 Kan. 714.

In the case of *State v. Longbottoms*, 11 Humph. 39, the indictment for larceny charged the defendant with having stolen "ten dollars, good and lawful money of the state of Tennessee," and it was held that this was not a sufficient description of the thing stolen. Money should be described as so many pieces of current gold or silver coin, and the coin must be stated by its appropriate name. In *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631, it was held that an indictment for larceny, describing the money as "three thousand dollars, lawful money of the United States," was insufficient.

In *State v. Williams*, 19 Ala. 15, 54 Am. Dec. 184, it was held that an indictment for larceny of bank notes should state their number, denomination, and value.

In *Fredrick v. State*, 3 W. Va. 695, the property was described as: "Four legal-tender notes of the United States of America, each one thereof for the payment of and of the value of ten dollars, each current of the United States, and amounting to the sum of forty dollars; also, one national currency note on the First National Bank of Newport, for the payment of and of the value of ten dollars,—amounting in the aggregate to the sum of fifty dollars." And the description was held insufficient.

In *United States v. Barry*, 4 Cranch C. C. 606, it was held that an indictment for the larceny of a bank note must state the amount as well as the value.

In *Lavarre v. State*, 1 Tex. App. 685, where an indictment described the property stolen as "three hundred gold dollars, the property of the alleged owner," without alleging the value of the gold dollars, or that they were lawful money of current coin of the United States, or other country, the indictment was held to be defective for want of sufficient description.

In *Ridgeway v. State*, 41 Tex. 232, it was said: "The rule is, that the property must be described with reasonable certainty, whenever practicable to do so; and therefore when it can be done, the species of coin must be specified, as 'fifty pieces of the current coin of the United States, commonly called half-dollars.' When a particular description cannot be given, it should be stated in the indictment, after giving such as the grand jurors can certainly make of the property."

In *Martinez v. State*, 41 Tex. 164, it was held that an indictment for theft of "one hundred and eighty-two dollars in United States currency" was defective for want of a sufficient description of the property stolen, and of averment of its value.

In *Merwin v. People*, 26 Mich. 299, 12 Am. Rep. 314, it was said: "The present information utterly fails to comply with this rule, or to state any excuse for non-compliance. The charge is only of the stealing of the personal property, goods, and chattels of John Connell, one hundred and thirty-five dollars."

The court further said: "I have found no case and no principle of common-law pleading upon which such indictment or information can be sustained, without showing upon the face

of the indictment some excuse for the want of greater particularity."

In *State v. Kroeger*, 47 Mo. 530, it was said that an indictment for larceny which describes the property stolen as "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars; five thousand dollars in money, of the value of five thousand dollars," should be held not sufficient.

In *State v. McAnulty*, 26 Kan. 533, it was said: "The general rule is, that an article stolen should be described with such certainty as will enable a jury to decide whether such article proved to have been stolen is the very same with that upon which the indictment or information is founded, and show judicially to the court that it can be the subject-matter of the offense charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment or information relating to the same article; and it is also the rule that where several articles are alleged to have been stolen, the number and value of each shall be given."

In many of these cases, the questions reviewed came to the courts as this is brought here, upon the record alone, and the information or indictment and the judgment were alone considered. Among which see *Merwin v. People*, 26 Mich. 305; 12 Am. Rep. 314; *Lavarre v. State*, 1 Tex. App. 686; *State v. Kroeger*, 47 Mo. 530. See also *Arnold v. State*, 52 Ind. 281; 21 Am. Rep. 175; *Hickey v. State*, 23 Ind. 21; *Monsall v. State*, 35 Id. 460; *Brennon v. State*, 25 Id. 403; *People v. Jackson*, 8 Barb. 637; *Collins v. People*, 39 Ill. 233; *State v. Goodrich*, 46 N. H. 186; *Sheppard v. State*, 42 Ala. 531.

The second objection to the information is, that it fails to allege that the property taken—"twenty-five dollars in money"—was of any value. The charge differs from the crime of larceny only in this: In larceny the value must be stated definitely and certainly, for two reasons: 1. To fix the crime; and 2. To determine the grade of the offense and fix the punishment; while to constitute robbery, it is necessary that the property or thing taken should have either an intrinsic or relative value: *Talley v. State*, 1 Tex. App. 688.

In *People v. Nelson*, 56 Cal. 77, it was said: 'It is obvious from the foregoing definitions that an indictment for robbery must aver every fact necessary to constitute larceny, and more. The jury may find a defendant guilty of any offense,

the commission of which is necessarily included in that which is charged in the indictment."

"Twenty-five dollars in money" may, it is true, mean gold or silver coin of the United States, or treasury notes, or any other denomination known and used, and which circulates as money; or it may mean only some paper, such as state bank bills or confederate money, or bills purporting to be of the value of twenty-five dollars. There should be no uncertainty, and no excuse can be given for leaving to conjecture what can be so easily stated. Either the property must be designated or described so that it can be easily known and recognized as money, such as is in usual circulation and exchange as money. To designate it as gold and silver coin or treasury notes, or national bank notes issued by the government of the United States, would perhaps be sufficient to impute a value: *Smith v. State*, 33 Ind. 159; *Talley v. State*, 1 Tex. App. 688; *Arnold v. State*, 52 Ind. 281; 21 Am. Rep. 175; *Merwin v. People*, 26 Mich. 298; 12 Am. Rep. 314; *Jackson v. State*, 69 Ala. 249.

While perhaps it may be said that under our liberal code pleadings that degree of exactness is not required that is necessary under the common law, yet we do not understand the rule to be so far relaxed as not to require the pleader to formally state a public offense in an information, however liberally the code may be interpreted. The bill of rights still provides that the accused has the right to know "the nature and the cause of the accusation against him." The nature of the accusation must mean and include a description of the offense. We are therefore of the opinion that the information is fatally defective, and not sufficient to sustain the judgment of conviction.

We therefore recommend that the cause be reversed, and remanded for further proceedings in accordance with the views herein expressed.

It is so ordered.

INDICTMENT — DESCRIPTION OF MONEY. — In an indictment for larceny, money should be described as so many pieces current gold or silver, in coin of the country, of a particular denomination, as the circumstances of the case happen to be. The species of the coin must be specified. A description, "three thousand dollars, lawful money of the United States," is not sufficient: *People v. Bail*, 14 Cal. 101; 73 Am. Dec. 631. But in *People v. Green*, 15 Cal. 512, it was decided that an indictment charging larceny of a certain number of twenty and ten dollar gold pieces, giving their total value, was not defective because it did not aver the value of each particular piece of coin; and in *Commonwealth v. Grimes*, 10 Gray, 470, 71 Am. Dec. 666, it is said that

bank bills are sufficiently described in an indictment as "sundry bank bills, of some banks respectively to the said jurors unknown, of the value of thirty-eight dollars," the property of a person in the indictment named; for the number of bank bills stolen need not be given, if the indictment states their aggregate amount. And to the same effect is *State v. Williams*, 112 Mass. 292, in which *Commonwealth v. Grimes*, *supra*, was cited as authority. An indictment charging the stealing of bank notes *eo nomine* is sufficient, when the number, denomination, and value of such notes are stated therein: *State v. Williams*, 19 Ala. 15; 54 Am. Dec. 184; and in *Arnold v. State*, 52 Ind. 281, the court held an indictment for larceny bad, because it failed to state the denomination of the bills alleged to have been stolen, and cited the case of *State v. Williams*, 19 Ala. 15; 54 Am. Dec. 184. Bank bills described as of a particular denomination, issued by a certain bank, signed by the president and cashier of such bank, and belonging to such bank, is a sufficient description to enable the accused to know the crime of which he is accused, and therefore good in an indictment for larceny: *Bullock v. State*, 10 Ga. 47. And in *Berry v. State*, 10 Id. 519, *Bullock v. State*, *supra*, was cited to the point that a description of coin as so many dollars in silver was a sufficient description of the property alleged to have been stolen. General description of a stolen bank bill is good, giving its value and specifying the bank which issued it, without alleging it to be genuine: *State v. Smart*, 4 Rich. 356; 55 Am. Dec. 683; and this case was cited in *State v. Evans*, 15 Rich. 31, to uphold an indictment charging the larceny of "a ten-dollar bill of the currency of the country, commonly called paper money, of the value of ten dollars," etc. "Three dollars in divers pieces of silver current in this state," is not sufficient as a description of stolen money in an indictment for larceny: *Lord v. State*, 20 N. H. 404; 51 Am. Dec. 231, and monographic note 232-235. As to a general discussion of what an indictment for larceny of money should state, compare note to *State v. McCune*, 70 Am. Dec. 178-191. Under the Indiana statutes, it is only necessary in an indictment for larceny of money to describe the money stolen simply as money; but if a particular description is given, it must be proved substantially as charged: *Lewis v. State*, 113 Ind. 59.

ANDERSON v. CITY OF WELLINGTON.

[40 KANSAS, 178.]

MUNICIPAL CORPORATIONS. — POWER TO ENACT CITY ORDINANCE must be vested in governing body of city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation, and not simply convenient. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

MUNICIPAL CORPORATIONS. — ORDINANCES PASSED BY GOVERNING BODY OF CITY must be reasonable, not inconsistent with the laws of the state, nor repugnant to the fundamental rights; they must not be oppressive, partial, or unfair, nor make special or unwarranted discriminations, and must not contravene common right.

MUNICIPAL CORPORATIONS — STREET PARADES — ILLEGAL ORDINANCE. — City ordinance declaring it unlawful for any persons, society, associ-

ation, or organization to parade any public street, avenue, or alley of the city, shouting, singing, or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended, or calculated to attract or call together an unusual crowd of people upon such street, etc., without first having obtained in writing the consent of the mayor, or, in his absence, the president of the city council, city clerk, or city marshal, in the order named, authorizing such parade, is illegal and void, as being of doubtful delegated power, unreasonable, partial, and in contravention of common right.

PROSECUTION for violation of a city ordinance. The opinion states the case.

Halsell and Ray, and Ready and Ready, for the appellant.

Isaac G. Reed, and McDonald and Parker, for the city.

SIMPSON, C. On the fifteenth day of August, 1887, the following ordinance was duly passed and approved by the mayor and council of the city of Wellington, then and now a city of the second class, to wit:—

“ORDINANCE No. 422.

“An ordinance for the regulation of street parades, and the prevention of public disturbances and breaches of the peace.

“*Be it ordained by the mayor and councilmen of the city of Wellington, Kansas:—*

“1. It shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to parade any public street, avenue, or alley of the city of Wellington, Kansas, shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, or doing any other act or acts designed, intended, or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues, or alleys, without having first obtained in writing the consent of the mayor of said city authorizing such parade. In case of the absence of the mayor from the city, such consent may be granted by the president of the council, city clerk, or city marshal, in the order named; *provided*, that the provisions of this section shall not apply to funerals, fire-companies, regularly organized companies of the state militia, or United States troops.

“2. Any person or persons violating any of the provisions of section 1 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction in the police court of the city of Wellington shall be fined in any sum not less than

five dollars nor more than one hundred dollars, or imprisonment for a period not exceeding ninety days, or both such fine and imprisonment, in the discretion of the court.

"3. This ordinance shall take effect and be in full force from and after its publication once in the official newspaper of the city of Wellington, Kansas."

The ordinance, duly signed and attested, was, on the seventeenth day of August, 1887, published in the Wellington Morning Quid-Nunc, a paper printed and published in said city, and known and recognized as the official newspaper thereof; and the issue of said newspaper which contained said publication was printed, delivered, and distributed throughout the city before and by the hour of seven o'clock, A. M., of said day. At about eight o'clock in the evening of the same day, the appellant and others, calling themselves the Salvation Army, assembled at their hall or barracks in the city, and under the command of their female captain (Shiltz), who had seen and read the published ordinance in the morning, proceeded to parade Washington Avenue and other public streets of the city, singing, shouting, and playing tambourines, etc., to attract an unusual crowd thereon, and expecting to be arrested therefor. And thereupon the arrest of the appellant and a number of his male and female associates was made, and appellant and two other males (the females, in consideration of their sex, having been released from arrest) were tried and convicted in the police court, from which appeals were taken to the district court, where convictions were again had; and appellant, Isaac Anderson, brings his case here. He attacks the validity of the ordinance, and claims it is void, because,—1. It is not within the power of the city council to enact such an ordinance; 2. The ordinance undertakes to make that criminal which in its nature is not criminal; 3. Because it gives to the officers named, not the right to regulate, but to prohibit, street parades; 4. Because it is unreasonable and oppressive, and does not act upon all classes alike, and is not fair, general, and impartial. It is also objected to because it had not been legally published; and because it contains more than one subject; and because it attempts to revise and amend another ordinance without referring to the same, and repealing it, in violation of section 746, Compiled Laws of 1881, page 165.

As to the power of the council to pass such an ordinance, our attention has been called to sections 31, 50, 67, chapter 19, of the Compiled Laws of 1885. These, in general terms, au-

thorize the council to enact such ordinances as are not repugnant to the constitution and laws of the state, and such as it shall deem expedient for the good government of the city, the preservation of peace and good order, and to restrain and prohibit noises, disturbances, and disorderly assemblies in any street, house, or place in the city. This is about the extent of the legislative grant of authority. The ordinance in question makes it unlawful for any persons, society, association, or organization to parade any public street, avenue, or alley of the city of Wellington, shouting, singing, or beating drums or tambourines, or playing upon any musical instrument designed, intended, or calculated to attract or call together an unusual crowd of people upon such street, avenue, or alley, without having first obtained, in writing, the consent of the mayor of said city authorizing such parades. Funerals, fire-companies, regularly organized companies of state militia, and United States troops are excepted from the operation of the ordinance. Persons convicted of the violation of the ordinance may be fined in any sum not less than five dollars nor more than one hundred dollars, or punished by imprisonment not exceeding ninety days, or by both fine and imprisonment.

The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation,—not simply convenient, but indispensable: *Dillon on Municipal Corporations*, 3d ed., 115, and authorities cited. Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter: *Breninger v. Belvidere*, 44 N. J. L. 350; *Horr and Bemis on Municipal Police Ordinances*, 18.

In addition to this, the ordinance must be reasonable; not inconsistent with the laws of the state; not repugnant to fundamental rights; must not be oppressive; must not be partial or unfair; must not make special or unwarranted discriminations, and must not contravene common right. These restrictions upon the power of the common councils of cities in this country have been frequently imposed, and almost universally recognized in all the courts of last resort that have expressed opinions upon the subject. The object of this ordinance, and

the danger apprehended and to be avoided by its enactment and enforcement as expressed by its terms is, to prevent the calling together of a large or unusual crowd of people on any of the streets, avenues, or alleys of the city of Wellington. Then the question is this: Is a street parade with music or singing legally objectionable in itself? or does it threaten the public peace or the good order of the community? There are other questions made in the briefs of counsel for appellant, but we shall consider only the general legal characteristics of the ordinance; for if it is not legal, the other questions go with it; and if it is, they are probably not important enough to justify reversal in this particular case. This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together, with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows' organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-school children cannot assemble at some central point in the city and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in its march by the written consent of his honor the mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets under any circumstances without permission. The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of every-day life in any city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate. We do not believe that the legislative grant of power to the city council as enumerated in the sections above cited can be so construed as to authorize the city council to take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land, to form their processions and parade the streets with banners, music,

songs, and shouts. It is an abridgment of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention, and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious, and political. It practically destroys these great public demonstrations that are the most natural product of common aims and kindred purposes. The power to pass such an ordinance should be clear and controlling before it can be upheld, and take away from the people the privilege that they have exercised ever since the organization of the government. Public parades of this character are not unlawful in their intent, purpose, and result; they are not *mala in se*. If they are to be *mala prohibita*, it ought to be by some general law, and not by local regulation.

"All charters and laws and ordinances must be capable of construction, and must be construed in accordance with constitutional principles, and in harmony with the general laws of the land; and any ordinance that violates any of the recognized rights and privileges, or the principles of legal and equitable rights, is necessarily void so far as it does, and void entirely if it cannot be applied according to its terms": *Frazee's Case*, 63 Mich. 396; 6 Am. St. Rep. 310.

We conclude that the city charter grants only such power to the common council of the city of Wellington as will enable the city to preserve the public peace and maintain good order, subject to the limitations and conditions required by the rights of the people themselves as secured by the general principles of the law, as exemplified by their universal action since the organization of the government and the common occurrences in every city in the Union on every public or festive occasion. The right of the people in this state by organization to co-operate in a common effort, and by a public demonstration or parade to influence public opinion and impress their strength upon the public mind, and to march upon the public streets of the cities of the state with the usual accompaniments of bands, banners, transparencies, glee clubs, and all the accessories of public meetings, is too firmly established, and has been too often exercised to be now questioned, or to be made the basis of an ordinance forbidding the same, predicated on the false assumption that they are dangerous to the peace of the public or inimical to the good order of the city. Of course

such parades are subject to the operation of the laws upon the subject of riots, mobs, unlawful assemblies, and nuisances, whenever they become so; and city ordinances and statutes of the state already afford ample protection to the public, and ready processes to prohibit, repress, and arrest offenders whenever the original purposes of such parades are perverted and they become criminal in character and action.

“It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns or in rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards; and to suppress things not absolutely dangerous as an easy way of getting rid of the trouble of regulating them is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power”: *Frazee's Case, supra*.

The title to the ordinance seems to indicate that the object in view was the regulation of street parades; and to regulate means to control, to govern, to subject to certain restrictions or restraints growing out of a condition of affairs or a state of public opinion, some threatened invasion of public or private rights, or some unusual commotion. The word employed necessarily implies that street parades are lawful, but that certain restrictions may be necessary to preserve the public from harm. It might be proper, on account of the peculiar condition of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night-time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation, and not prohibition, was the object of

the ordinance; because the power cannot be extended to prohibition, for the very essence of regulation is the existence of something to be regulated: *Sweet v. Wabash*, 41 Ind. 7; *McConvill v. Jersey City*, 39 N. J. L. 38; *Bronson v. Oberlin*, 41 Ohio St. 476; *Austin v. Murray*, 16 Pick. 12; *Duckwall v. New Albany*, 25 Ind. 283; *Shallcross v. Jeffersonville*, 26 Id. 193.

It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons combined for legal and meritorious purposes to parade the streets with music. The use of musical instruments on such occasions is not specially objectionable; songs and shouts, cheers, and the waving of banners have always been considered as demonstration of approval, and not as tending to create disturbances or provoke breaches of the peace. All these are the usual accompaniments of public demonstrations in every civilized country, and there is nothing in their use on all ordinary occasions of this character to justify absolute prohibition. It is not justified by the common experience, and our attention has not been called to any local disturbance that would seem to create a necessity for such an unusual attempt at regulation.

All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets expressly and intelligently; such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort.

For all these reasons, and because of all these results and consequences, we doubt the power of the city council of Wellington to pass the ordinance in question; and because it is not free from fair and reasonable doubt, resolve the question against the city, and pronounce the ordinance illegal and void.

It is recommended that the judgment of the court below be reversed, and the case remanded for further proceedings in accordance with this opinion.

It is so ordered.

CORPORATIONS. — The charters of corporations are to be strictly construed against the corporation, and what is not unequivocally granted in clear terms or necessarily implied must be taken to be withheld: *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *Monongahela B. Co. v. Kirk*, 46 Pa. St. 112; 84 Am. Dec. 527, and note.

MUNICIPAL CORPORATIONS — REGULATION BY A MUNICIPALITY OF SALVATION ARMY PROCESSIONS, ETC. — A very similar case to and one which is cited as authority in the principal case is *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310.

UNION PACIFIC RAILWAY COMPANY v. MOYER.

[40 KANSAS, 184.]

COMMON CARRIER — LIABILITY AS WAREHOUSEMAN. — If the owner of goods shipped over a railroad permits them to remain at the depot of their destination for an unreasonable time, the liability of the railroad company as carrier is thereby terminated, and it becomes liable only as warehouseman. But if the owner then demands the goods, and is informed by the agent in charge of the depot that they have not yet arrived, although they were at the time there, and afterward the depot and goods are destroyed by fire, the failure to deliver the goods on demand is such negligence as will render the company liable as warehouseman for their value.

COMMON CARRIER — CONTRACT LIMITING LIABILITY — EVIDENCE. — Where the shipper of goods is given a receipt therefor, containing on its back a contract limiting the liability of the carrier during transit, and the liability as common carrier when the goods should safely reach their destination, and the owner permits the goods to remain at their destination until the carrier becomes liable only as warehouseman, and the goods are afterward destroyed by fire, — in an action to recover their value, the receipt and contract are immaterial, and are properly excluded if offered in evidence.

ACTION to recover for freight burned in the defendant railway company's depot. The plaintiff, Moyer, on November 7, 1884, delivered to the Columbus, Toledo, and Hocking Valley Railroad Company the freight in question, to be shipped over that line and connecting lines to Clyde, Kansas. The freight reached its destination on November 19th, and was stored in the depot of the defendant, the Union Pacific Railway Company, at Clyde, and was there burned on the 29th of November. Other facts appear in the opinion.

A. L. Williams and Charles Monroe, for the plaintiff in error.

CLOGSTON, C. The plaintiff brought this action to recover the value of two boxes of household goods shipped by him from Rising Sun, Ohio, to Clyde, Kansas. The first question raised by the company is, that whatever its liability may be,

it could only be liable as warehouseman, and not as common carrier; and as the court submitted to the jury both questions, it is assigned as error. In this view, we are with the plaintiff in error, that whatever its liability is, it is as warehouseman, and not as common carrier. The goods, by the undisputed evidence and findings of the jury, had remained some nine or ten days at the depot before they were burned; and under the rule laid down in *L. L. & G. R. R. Co. v. Maris*, 16 Kan. 333, in which it was held that eight days was an unreasonable time for goods to remain in a depot, the lapse of such a length of time would terminate its liability as carrier. Plaintiff claims in his petition that the goods were destroyed by reason of the negligence of the company. If this was true, then that would constitute a liability on the part of the company as warehouseman; but as there is no evidence tending to show the cause of the fire at the depot, no negligence can be presumed. The only other circumstance we find in the evidence to show negligence is the fact that the plaintiff, through his agent, demanded the goods of the company on the 27th of November. The goods were there, and had been there some eight days at that time; and if they had been delivered to the plaintiff, would not have been burned on the 29th. This we think was negligence such as would make the company liable as warehouseman. It was its fault that the goods were not delivered, and not the fault of the plaintiff. It is true that by his fault he released the company from liability as carrier, and its relation became one in which only by the negligence of the company would it become liable for the goods. And by its refusal to deliver the goods plaintiff must recover: See *Kansas City etc. R. R. Co. v. Morrison*, 34 Kan. 502; 55 Am. Rep. 252. In this view of the case, the error in the instructions is not material; for if the defendant was liable as warehouseman by reason of its negligence, the proof of such negligence not being controverted, the instructions could do no harm.

The second error alleged is, that the court refused to allow in evidence the receipt and contract under which the goods were shipped. The evidence shows that at the time the goods were shipped the rate of freight was agreed upon, the money paid, and a receipt was given for the goods, which contained on its back certain limitations exempting the company from liability as common carrier and certain other liabilities. This receipt was offered in evidence, and the court refused to per-

mit it. In this we see no error. This contract was one made for the benefit of the company and connecting lines in the shipment of the goods, and related to the goods during such transit, and while in their hands as common carriers. There is no question in this case but that the goods reached their destination. The receipt and contract was for their conveyance from Rising Sun, Ohio, to Clyde, Kansas, and limited the liability of the company as common carrier when the goods should reach the latter point. The receipt and contract, then, had spent its force when the goods reached Clyde. It becomes immaterial, then, what the contract was in relation to the shipment of these goods. They had been shipped, the freight had been paid, the goods had been received at Clyde, and the liability of the company as a common carrier had ceased. What object, then, would it serve, or what fact would it establish? It certainly was immaterial, and was properly excluded.

We see no error in the instruction of the court, and therefore recommend that the judgment of the court below be affirmed.

It is so ordered.

COMMON CARRIERS—WAREHOUSEMEN.—A carrier is bound to give the consignee notice of the arrival of goods, and a reasonable opportunity to take them away, and thereafter he holds them simply as a warehouseman, and is liable only for ordinary negligence: *McMillan v. Michigan S. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Hermann v. Goodrich*, 21 Wis. 543; 94 Am. Dec. 563; *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; *Shenk v. Philadelphia S. P. Co.*, 60 Pa. St. 109; 100 Am. Dec. 541; *Wood v. Crocker*, 18 Wis. 345; 86 Am. Dec. 773; *Tarbell v. Royal Exch. Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350, and note 356.

WAREHOUSEMEN—DUTIES AND LIABILITIES GENERALLY: See extended note to *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 145-160; and see particularly as to liability for loss by fire, *Id.*; *Aldrich v. Boston etc. W. Co.*, 100 Mass. 31; 97 Am. Dec. 74; 1 Am. Rep. 76.

COMMON CARRIERS CANNOT LIMIT THEIR LIABILITY FOR NEGLIGENCE BY CONTRACT: *McFadden v. Missouri Pacific R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721, and note 723; *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670, and note 673; *Merchants' Dispatch T. Co. v. Bloch Brothers*, 86 Tenn. 392; 6 Am. St. Rep. 847, and note 864; but they may, by special contract, limit their common-law liability: *McFadden v. Missouri Pacific R'y Co.*, *supra*; *Merchants' etc. Co. v. Bloch Brothers*, *supra*; though it was held otherwise in case of *Gulf etc. R'y Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494.

OSAGE CITY v. LARKIN.

[40 KANSAS, 206.]

DEDICATION — PUBLIC ALLEY IN CITY. — Simple fact of dedication to public of alley in city makes it a public way, and no further action is required on the part of the city to open it for the use of the public generally.

DEDICATION. — ALLEY IN CITY RETAINS ITS CHARACTER AS SUCH, although one person owns the land on both sides of it, and it is so obstructed by the road-beds of a railroad as to be practically impassable for general travel.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE. — City is guilty of negligence in permitting dangerous machinery to remain for years in an alley of the city, and so likewise is the owner of adjoining lots who placed it there; and both are liable for injuries sustained by a child under nine years of age who was hurt by falling upon such machinery.

ACTION by Margaret Larkin, a minor, by her next friend, against the city of Osage City and one Adams, to recover damages for personal injuries. The place where the plaintiff received the injuries complained of was an alley in said city. The elevator of the defendant Adams was on one side of the alley, and his hay-press just opposite on the other side, and the machinery of the hay-press was connected with the engine of the elevator by a tumbling-rod, in passing over which the plaintiff was caught and thrown down, and injured. Other facts appear in the opinion. A verdict and judgment thereon was rendered for the plaintiff against both of the defendants, and they seek to have the judgment reviewed.

A. J. Utley, F. H. Connelly, and Thomson and Heizer, for the plaintiffs in error.

H. B. Hughbanks and B. F. Hendrix, for the defendant in error.

HOLT, C. Both of the defendants allege several errors at the trial. We will premise this opinion by stating that under the facts in the case as shown by the record, if the city is liable by reason of its negligence in permitting the tumbling-rod of defendant Adams to remain as an obstruction in an alley, then he would also be liable. Of the many assignments of error, the only ones we care to notice are those referring to the rulings upon the admission and rejection of evidence, and the instructions to the jury relating to the question whether the place where the little girl was hurt was in fact an alley in the city of Osage City which the public had the right to use. The filing and recording of the plat of the city, duly

made, acknowledged, and certified, without further action on the part of the city, made this parcel of land an alley, and vested the fee in the county for public use. The defendants argue that, although it might be an alley, yet the city had never attempted to open and improve it or mark its boundaries, and therefore that they are not liable for injuries that occurred in traveling over it. They claim that until a city attempts to make streets or alleys suitable for public travel, and thus invites the public to use them, it is not liable for injuries upon such unimproved or unopened streets or alleys; and further, that when it does improve them, it is only compelled to improve those parts of the street or alley which are necessary for traveling; and they cite a list of authorities to sustain their contention. They claim that in this instance one of the defendants—Asher Adams—owned the land on both sides of this alley; that it was obstructed by the roadbeds of the Atchison, Topeka, and Santa Fé railroad, so as to render it practically impassable for general travel, and therefore it was used solely for his own benefit as a means of ingress to and egress from his elevator and hay-press; and as he never fenced it or laid it off, but used it indiscriminately with the other part of the block south of the railroad, it never acquired the public character usually given alleys.

They claim further that a city is not under the same obligations to open and improve an alley that it is a street; that the object and purpose of a street is for the general travel of the public, while an alley is used primarily for the convenience of the abutting land-owners, and when the land abutting an alley is all owned by one individual he has the right to obstruct the same and use it as his own property; and they cite a list of Michigan authorities referring to alleys in the city of Detroit.

We cannot agree with the claim of defendants, nor do we believe that the authorities they cite sustain the propositions advanced. Alleys in the city of Detroit were not dedicated in the way that alleys are in Kansas. The dedication of an alley in this state has the same force and is in the same terms as the dedication of a street. It may be, and probably is, a fact that the interests of the public do not require that an alley should be kept in the same condition as a street, and it is probably true that alleys are largely used for the convenience of the abutting lot-owners, and certainly have less use as a public thoroughfare than the streets in a city, yet they are

dedicated to public use; public money may be expended upon them to improve them, and they can be used by the public generally; the abutting lot-owners have no such control over them as to exclude the general public from their enjoyment, and an accident happening in an alley used for public travel occasioned by an obstruction therein may make the city liable for the injury so sustained.

In this instance it is claimed that this alley was not publicly and formally opened. Our statute does not require any formal opening of a street or alley where there has been a dedication; the simple fact of dedication makes it a public way. It is claimed, however, that until there is some work done to invite the public to travel over a street or alley, the traveler uses the street or alley at his own peril. We think that contention, whether sound or not, has no bearing on this case. The testimony shows that this portion of this alley was comparatively smooth ground, and that this obstruction was not one that existed from the natural formation of the land, but was placed there by the defendant Adams, and allowed to remain for years with the knowledge of the city of Osage City. It was a dangerous obstruction placed upon an alley dedicated to the public, and while it would not probably have been permitted to remain on a public street or alley which was in constant use by the public as a thoroughfare, yet it was upon public ground on which the public had the right to travel. It is this particular fact in the case that makes the authorities cited by the defendant inapplicable.

It was not the failure of the city to open the alley and keep it in repair that the plaintiff complains of as causing the injury sustained, but it was its negligence in allowing this trap to remain for so long a time in an alley dedicated to the public, and over which any person had the right to travel. This child, under nine years of age, did not sustain the injury complained of by reason of the natural roughness and unevenness of the ground, but by falling upon a dangerous piece of machinery which had been permitted to remain uncased and unprotected for years in an alley of this city. This action was tried upon this theory, and the instructions given and rulings upon the introduction and rejection of evidence were all consistent with it. This was correct. We find no material error in the trial of this case, and recommend that the judgment be affirmed.

It is so ordered.

DEDICATION OF PROPERTY TO PUBLIC USE. — Where an owner of land lays off a town or village thereon, and makes a map of the town site, showing it to be divided into streets, alleys, blocks, and lots, and then sells the lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public; and to make the dedication complete, no formal acceptance by the town authorities is necessary; for the owner of the land holds the land and the title in trust for the public: *Town of San Leandro v. Le Breton*, 72 Cal. 170; and to the same effect is *Meier v. Portland Cable R'y Co.*, 16 Or. 500. And in Missouri, it was held that when there is an offer, or an attempt, to dedicate land to the public use, and such offer is followed by adverse use by the public, under a claim of right, no formal acceptance by corporate officers is necessary: *Price v. Town of Breckenridge*, 92 Mo. 378. But in the states of Louisiana, Illinois, Michigan, and Texas, it has been held otherwise. In the absence of clear proof of dedication to the public use, or of formal assent by the owner from which the same can be inferred, a road used by the public by the tolerance of the owner for thirty years, and even longer, will not be declared a public road: *McCleary v. Lemeunier*, 40 La. Ann. 253. The two prominent elements to be considered in determining whether there has been a common-law dedication or not are: 1. The intention of the owner to dedicate; and 2. The acceptance by the public of the intended dedication: *City of Chicago v. Stinson*, 124 Ill. 510. In order to make a complete dedication of streets and alleys by the making, acknowledging, and recording of a town plat, the acceptance of the municipal corporation is necessary; and until acceptance, the fee does not vest in the corporation, but remains in the original proprietor: *Hamilton v. Chicago etc. R. R. Co.*, 124 Ill. 235; *Irving v. Ford*, 65 Mich. 241; in order that a city may claim rights under a proffer made by an individual to dedicate property for the use of the city, there must have been some act within a reasonable time after the proffer was made, indicating an acceptance of the dedication on the part of the city authorities: *City of Galveston v. Williams*, 69 Tex. 449. Also in the case of *Commonwealth v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599, it was held that a dedication of a street or an alley to the public use is not perfect unless it is accepted by the municipal authorities: Compare *Trustees of M. E. Church etc. v. Mayor etc. of Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696, and note 706, 707; and monographic note to *State v. Trask*, 27 Am. Dec. 559-570.

LONG v. HINES.

[40 KANSAS, 216.]

MORTGAGES — CHATTEL MORTGAGE ON UNPLANTED CROP. — A chattel mortgage given upon an unplanted crop of corn creates no lien on the crop afterward planted and grown which will defeat the levy of an execution thereon made at the instance of a creditor of the mortgagor before possession of the crop taken by the mortgagee, although the mortgage was duly filed for record before the levy was made.

IN March, 1885, Daniel Hines executed and delivered to William and Joseph Hines, the defendants in error, a chattel mortgage upon forty acres of growing flax, and forty-five acres

of growing corn, on certain land described, in Miami County, to secure them from loss by reason of their indorsement of certain notes, and the mortgage was duly filed for record two days afterward. In October, 1885, the plaintiff in error, as constable, levied upon forty-five acres of growing corn on the land described, as the property of Daniel Hines, by virtue of an execution issued on a judgment duly rendered against said Hines. In November, 1885, the defendants in error commenced this action of replevin against said constable for the possession of said forty-five acres of corn claimed by them as the corn described and named in the chattel mortgage from Daniel Hines to them. At the time of the execution of the mortgage, neither the flax nor the corn mentioned therein had been planted; but afterward forty-five acres of corn were planted, and forty acres of flax sown. It was agreed that the corn mentioned in the mortgage was the same which was afterward planted by Daniel Hines, and the same that was levied upon by execution, and that prior to the levying of said execution nothing had been done by said mortgagees toward taking possession of the corn, and that nothing had been done by the mortgagor and mortgagees toward ratifying or making valid said chattel mortgage. Judgment was rendered in favor of the mortgagees for the possession of the corn, and the constable brings the case for review.

Thomas M. Carroll, and W. H. Sheldon, for the plaintiff in error.

W. T. Johnson, for the defendants in error.

CLOGSTON, C. This was an action commenced by the defendants in error to recover possession of forty-five acres of corn claimed by them by virtue of a chattel mortgage executed before the corn described in the mortgage was planted or had any existence. Can this claim be upheld? We think not. A valid mortgage can only be given upon property which has an actual or potential existence; and corn not planted has neither an actual nor potential life; and being without life or existence, there could be no legal transfer, present or prospective; and no pretended transfer could operate upon the crop of corn after being grown; at least, not until after taken possession of by the mortgagees. In this case there was no claim of any change of possession. Section 9 of an act in relation to chattel mortgages is as follows: "Every mortgage, or conveyance intended to operate as a

mortgage, of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the register of deeds, in the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county of which he shall at the time be a resident."

The object of recording a chattel mortgage is to impart notice that the mortgagee has a lien and claim upon the property mortgaged; and where a mortgage is recorded that is given upon a crop of grain not planted, the mortgage so filed and recorded does not impart a notice that the mortgagee claims an interest therein, but it is a direct notice that no mortgage lien is created, and that the mortgagee claims he has no interest therein, and, in substance, as if the mortgagee had there stated that he had no lien or claim or interest in the mortgaged property, for the reason that the property had no actual or potential existence at the time it was so mortgaged. In *Jones v. Richardson*, 10 Met. 493, it was said: "Now, it is clear, we think, that the record of a mortgage deed is no sufficient notice of a legal encumbrance as to subsequently acquired property; because, by law, no such property could be sold or conveyed thereby; and it would furnish no notice that any property would be afterward purchased, or if purchased, that any act would be done to ratify the grant in that respect. As to such property, therefore, the mortgage could not be valid, except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee, with the intention to ratify the mortgage, and the mortgagee retained open possession of the same until the time of the attachment."

Also in *Single v. Phelps*, 20 Wis. 419, it was held: "If there was no mortgage of file, then by the imperative operation of the statute the title of the purchaser must prevail. Now, it is conceded that property not in existence is incapable of legal transfer, and that an instrument purporting to transfer it by way of mortgage conveys nothing. What, then, was the mortgage upon file in the clerk's office? Clearly not a mortgage, but an instrument inoperative and void as such by its very terms. He has, then, no mortgage on file, and both the con-

ditions upon which his rights depend, by statute, as against the purchaser, are wholly wanting." See also *Cameron v. Marvin*, 26 Kan. 612, 628, 629; *Mowry v. White*, 21 Wis. 417; *Cudworth v. Scott*, 41 N. H. 456; *Cressey v. Sabre*, 17 Hun, 120; *Gittings v. Nelson*, 86 Ill. 591; *Tomlinson v. Greenfield*, 31 Ark. 557; *Chapman v. Weimer*, 4 Ohio St. 481.

This mortgage being void, and the property subject to execution, it was properly levied upon, and the right of possession was in the plaintiff in error.

It is recommended that the case be reversed, with an order to the court below directing that judgment be rendered for the plaintiff in error for the possession of the property, or for the amount of plaintiff's claim and costs.

It is so ordered.

See the case of *Long v. Hines*, *infra*, and note thereto, *post*, p. 195.

LONG v. HINES.

[40 KANSAS, 220.]

MORTGAGES. — MORTGAGE OF GOODS OR OTHER PERSONAL PROPERTY not owned by mortgagor at time of making or recording the mortgage is void as against subsequent purchasers or attaching creditors, although the mortgagor may afterwards acquire the property.

MORTGAGES — UNPLANTED CROP. — Chattel mortgage of crop to be grown in future, but which has not been planted at the time of the execution of the mortgage, is void as against subsequent purchasers or attaching creditors, although the mortgagor was in possession of land when the mortgage was executed.

THE facts appear in the preceding case of *Long v. Hines*, *ante*, p. 189.

HORTON, C. J. Upon the motion for rehearing in this case, it is earnestly and forcibly insisted that the law has been improperly declared in the *syllabus* and opinion already filed. We have re-examined the whole question, and are satisfied with the judgment rendered. There are many decisions to the contrary, but we are not inclined to follow them. In our view they are not sustained by good reasons.

At the time of the execution and recording of the chattel mortgage of March 7, 1885, the forty-five acres of growing corn therein mentioned had not been planted; therefore this property was not owned by the mortgagor, nor did it have any actual existence. The general rule seems to be that a mort-

gage of goods or other personal property which the mortgagor does not own at the time of making or recording the mortgage, though he may afterward acquire them, is void in respect to such goods or property as against subsequent purchasers or attaching creditors. In *Cameron v. Marvin*, 26 Kan. 612, the court said: "The next question is with reference to the rights of the parties to the property acquired by Patterson after the execution of all the mortgages. Of course this property was not included in the mortgages at the time of their execution. In fact, it could not have been included in the mortgages at that time, for it is not within the power of any person to mortgage property which does not exist, or which does not belong to him. He cannot mortgage property which is afterward to be created, or purchased, or procured. He can only mortgage property which at the time is in existence, and to which he has a title. Parties may make contracts with reference to future-acquired property, and contracts which will be legal and valid and will be upheld; but such contracts do not constitute chattel mortgages. They are simply executory contracts, to be performed in the future; and while they are binding upon the parties making them, they are void as to third persons who have no notice respecting them. They can never be treated as chattel mortgages affecting third persons. Such contracts, however, are always held valid as though they were chattel mortgages, as against third persons who have not in the mean time obtained any specific interest in the property when the mortgagee has obtained the possession of the property under the contracts. When a mortgagee takes possession of the future-acquired property under such a stipulation in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes the possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property."

In *Barnard v. Eaton*, 56 Mass. 294, Chief Justice Shaw, speaking for the court, said: "A mortgage is an executed contract; a present transfer of title, although conditional and defeasible; it can therefore only bind and affect property existing and capable of being identified at the time it is made; and whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor."

In *Chapman v. Weimer*, 4 Ohio St. 481, it was said: "This mortgage not only undertakes to convey to Chapman the goods then on hand, but all the goods that Marvin might thereafter acquire; and it authorizes Chapman at any time thereafter when he might see proper to do so to take possession of not only the goods then owned by Marvin, but those which he might subsequently own. It may be safely said that Chapman did not, by the mere execution of this mortgage, acquire any legal title to or lien on such subsequently acquired property. But when, after the execution of the mortgage, and after the mortgagor has acquired title to property not owned by him nor in his power to deliver at the time of the execution of the mortgage, he does acquire the title and possession of such property, and actually delivers the same to the mortgagee, a very different question arises."

These decisions do not effect a chattel mortgage covering the increase of property: *Corbin v. Kincaid*, 33 Kan. 649. See also *Jones on Chattel Mortgages*, 3d ed., sec. 138, and cases cited.

It is contended, however, that the mortgage of unplanted crops is valid, upon the ground that they potentially exist at the date of the mortgage. Chief Justice Hobart is quoted in support of that position. In the recent case of *Cole v. Kerr*, 19 Neb. 553, in reviewing the decision of Chief Justice Hobart, it was said: "Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for defendant in error, that the owner of the land, though he had not the future crop 'actually in view, nor certain, yet he had it potentially,' While it is true, as he adds, that 'the land is the mother and root of all fruits,' the word 'potentially,' as defined by Craig, means 'in possibility, not in act, not positively; in efficacy, not in actuality.' With this definition in view, it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially. Soil alone does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil, seed and labor, both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed,—something which I never heard contended for in

this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us.”

In *Butt v. Ellett*, 19 Wall. 544, Mr. Justice Swayne, speaking for the court, said: “The mortgage in that case could not operate, because the crops to which it related were not then in existence.”

In *Hutchinson v. Ford*, 9 Bush, 318, it is decided that “a mortgage of a crop to be raised on a farm during a certain term passes no title if the crop was not sown when the mortgage was executed.”

It was said in *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374, that “the court will take judicial notice of the seasons, and of the general course of agriculture; and in that case the court took notice of the fact that a crop of corn could not have matured on the tenth of August so as to be severed from the soil; and it will take like notice that at neither the date of the execution nor the recording of the mortgage was the crop upon which it was intended to operate planted or in being”: 1 Greenl. Ev., sec. 5.

It was also said in *Tomlinson v. McClure*, 31 Ark. 557: “It is well settled, we think, that as the law was previous to the act of February 11, 1875, making valid mortgages on crops to be planted, and when the mortgage in this case was executed, there could be no legal transfer, present or prospective, of property not in existence, and that a mortgage of such was without effect at law.” See also *Comstock v. Scales*, 7 Wis. 159; *Milliman v. Neher*, 20 Barb. 37; *Barnard v. Eaton*, 2 Cush. 295.

The motion for a rehearing will be overruled.

CHATTEL MORTGAGES. — A MORTGAGE OF GOODS WHICH THE MORTGAGOR DOES NOT OWN when the mortgage is made, though he afterwards acquires them, is void as against his attaching creditors: *Jones v. Richardson*, 51 Mass. 481; *Chapman v. Steinbacher*, 4 Ohio St. 481; *Gittings v. Nelson*, 86 Ill. 591; *Cudworth v. Scott*, 41 N. H. 456; *Williams v. Briggs*, 11 R. I. 176; 23 Am. Rep. 518; *Griffith v. Douglass*, 73 Mo. 532; 40 Am. Rep. 395; *Huthison v. Cortlett*, 11 R. I. 482; 23 Am. Rep. 518; note to *McCaffrey v. Woodin*, 22 Am. Rep. 653-656; note to *Gregg v. Sandford*, 76 Am. Dec. 723. *Contra*, *Aquers v. Wasson*, 51 Cal. 620; 21 Am. Rep. 718. An agreement in writing, whereby a farmer professes to give a lien for supplies upon the crops to be raised on certain lands described, and upon “any other lands he may cultivate in the county,” is good as to the crops on the land described, but void absolutely as to those raised on “any other lands”: *Gwoatheny v. Ethiridge*, 99 N. C. 571. A mortgage on crops not yet grown, but to be grown in the future, is valid in Iowa: *Norris v. Hix*, 74 Iowa, 524.

SWITZER v. CITY OF WELLINGTON.

[40 KANSAS, 250.]

MUNICIPAL CORPORATIONS — LIABILITY TO GARNISHEE PROCEEDINGS. — The term "corporation," as used in Kansas Compiled Laws of 1879, chapter 81, section 54 a, has reference solely to private corporations organized for private purposes, and does not include municipal corporations; and a city of the second class cannot be required to answer as garnishee, and is not liable under the provisions of said statute.

MUNICIPAL CORPORATIONS. — **CITIES ARE EXEMPTED FROM GARNISHEE PROCESS**, upon the ground of public policy, for the reasons that it would impair their usefulness and power in the discharge of their functions, drawing them into litigation, and occupying the time of their officers in expensive and vexatious suits in which they had no interest, and compelling them to expend the money of the people and the time of their officials on a matter wholly foreign to their creation.

John M. Graham and Isaac G. Reed, for the plaintiff in error.

W. H. Stafflebach, and Lawrence and Ferguson, for the defendant in error.

HOLT, C. On January 8, 1883, H. Switzer, the plaintiff in error, brought an action in justice's court against James Cronin, and recovered judgment by confession on the thirteenth day of January; at the same time he served a garnishee process upon P. A. Wood, mayor of the city of Wellington. Upon the 22d of January the mayor answered, under oath, that the city was indebted to James Cronin in the sum of \$45.88. The city failing to pay this amount, the plaintiff brought this action to recover it. Judgment was rendered for the defendant in justice's court, and the case was taken to the Sumner district court on error, where the judgment was reversed, and the case held for trial in said court; upon trial, judgment was again rendered for defendant.

It appears that the city of Wellington was indebted to Cronin on a contract for work upon the streets, but it was agreed in open court that the only question sought to be presented here should be whether or not a municipal corporation should be required to answer as a garnishee in justice's court. The plaintiff contends that section 54 a, chapter 81, Compiled Laws of 1879, authorizes such a proceeding. It is as follows: "That in all personal actions arising upon contract before justices of the peace, if the plaintiff, his agent or attorney, shall file with the justice, at the time of or after the commencement of suit, an affidavit stating that he had good reason to believe, and does believe, that any corporation or person

to be named, and within the county where the action is brought, has property, money, goods, chattels, credits, and effects in his hands, or under his contract [control], belonging to the defendant, or that such corporation or person is anywise indebted to the principal defendant, whether such indebtedness be due or not, that the principal defendant (naming him) is justly indebted to the plaintiff in a given amount, over and above all legal set-off, and that the plaintiff has good reason to and does believe that he will lose the same unless a garnishee summons issue to the aforesaid person, a garnishee summons shall be issued and personally served, in the same manner as an ordinary summons, and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money, and articles in his hands, or due from him to the defendant."

It is contended that the phrase "any person or corporation" includes a city of the second class; that the term "corporation" is used without limitation, and embraces not only private but public corporations. We think that the term "corporation," as used in this section, has reference solely to private corporations organized for private purposes, and that it does not include municipal corporations. Cities are a part of the government, and should not be required to become involved in litigation in which they have no interest. This exemption from garnishee process is based entirely upon the ground of public policy. The reasons given by different courts are numerous; among others, that it would impair the usefulness and power of such corporations in the discharge of their functions; it would draw cities into litigation, and occupy the time of their officers in expensive and vexatious suits in which they had no interest, and would compel them to expend the money of the people and the time of their officials on a matter wholly foreign to their creation; it might impede public improvements and the execution of contracts in which the public would be interested. In *Merwin v. City of Chicago*, 45 Ill. 133, 92 Am. Dec. 204, the court says: "But in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials

in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures, merely to promote private interest or private convenience": *Wallace v. Sawyer*, 54 Ind. 501; *McDougal v. Hennepin Co.*, 4 Minn. 184; *State v. Eberly*, 12 Neb. 616; *Hawthorne v. City of St. Louis*, 11 Mo. 59; 47 Am. Dec. 141; *Erie v. Knapp*, 29 Pa. St. 173; *Mayor etc. of Mobile v. Rowland*, 26 Ala. 498; *Mayor of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Burnham v. City of Fond du Lac*, 15 Wis. 193; *Buffin v. City of Racine*, 26 Id. 449; *School District v. Gage*, 39 Mich. 484; 33 Am. Rep. 421; *McLellen v. Young*, 54 Ga. 399; 21 Am. Rep. 276; Drake on Attachment, sec. 516; Wade on Attachment, secs. 345, 419; Waples on Attachment and Garnishment, 236 et seq.; see also *McCubbin v. City of Atchison*, 12 Kan. 166, and notes of reporter, 169, 170.

The authorities are not entirely uniform: *Contra*, *City of Newark v. Funk*, 15 Ohio St. 462, in which the court held that a municipal corporation could be garnished. The statute of Ohio provides that "any claims or choses in action due, or to become due," to the judgment debtor, and all "money, goods, or effects which he may have in the hands of "any person, body politic or corporate," may be made subject to the payment of a judgment. Also see *Wilson v. Lewis*, 10 R. I. 235; *Bray v. Town of Wallingford*, 20 Conn. 416; *Adams v. Tyler*, 121 Mass. 380.

Plaintiff contends, if this were the ordinary and fair interpretation of section 54 a, the defendant has waived it by the answer of the mayor to the garnishee process, and cites *Clapp v. Walker*, 25 Iowa, 315. That authority is not applicable in this case. That action was brought against a school district, and the district admitted an indebtedness for a part of the amount claimed, and denied its indebtedness for any greater

sum; a trial was had, and the verdict set aside; and after the evidence was all introduced in the second trial, the court was asked to instruct the jury that a municipal corporation could not be garnished, and therefore was not liable.

In the action of *Switzer v. Cronin*, the mayor, in response to a garnishee summons, answered simply that the city was owing Cronin \$45.88. When this action was brought against the city, it denied its liability at once, and has contested this action on the ground that, being a municipal corporation, it was not answerable to Switzer for any amount it might be owing Cronin.

The plaintiff calls our attention to section 102, chapter 18, Compiled Laws, relating to cities of the first class, which is: "Lands, houses, moneys, debts due the city, and property and assets of every description belonging to any city under this act, shall be exempt from taxation, execution, and sale, and such cities shall not be required to answer as garnishee in any action."

And also to section 104, chapter 19, relating to cities of the second class, as follows: "All lands, houses, moneys, debts due the city, and property and assets of every description belonging to any city or municipal corporation, . . . shall be exempt from taxation."

The plaintiff contends that because the clause "and such cities shall not be required to answer as garnishee in any action" is omitted in section 104 of chapter 19, it was intended that cities of the second class should be required to answer as garnishee, and that under the ordinary rules of construction, cities of the first class only were intended to be exempt. We concede the force of this argument; but it does not necessarily follow because it was inserted in the law governing cities of the first class that the rule would have been otherwise if it had been left out. The acts relating to cities of the first and second class were enacted at different times; the one concerning cities of the second class in 1872, and the other in 1881. We cannot say that the omission from the earlier act was intentional. We believe the rule to be that, before a city is required to answer in garnishee proceedings, there must be an express provision of the statute compelling it to do so. This being the law, its omission would not justify the inference of plaintiff.

The rule of construction contended for by plaintiff is not clearly applicable to the statutes cited and compared; and we

think such construction should yield to the more important question of public policy, and that no city, without an express provision of the statutes, should be drawn into litigation in which it has no interest, and wholly foreign to the purposes of its creation, and the money of the people expended, and the time of its officials devoted to matters of no public interest or benefit.

We therefore recommend that the decision of the court below be affirmed.

It is so ordered.

MUNICIPAL CORPORATIONS ARE NEVER LIABLE TO THE PROCESS OF GARNISHMENT; and if summoned as garnishees, they must be discharged on simple motion, without even first making answer: *Mervin v. Chicago*, 45 Ill. 133; 92 Am. Dec. 204; *Boynton v. Wicker*, 45 Ill. 137; *Triebel v. Colburn*, 64 Ill. 378. And for a general discussion as to whether states, counties, townships, cities, or the United States may be subjected to the process of garnishment, see monographic note to *Divine v. Harvie*, 18 Am. Dec. 200-207. But in Colorado, by virtue of the statutes of that state, a municipal corporation is liable to garnishment upon a judgment obtained in a district court: *City of Denver v. Brown*, 11 Col. 337.

STATE v. HALL.

[40 KANSAS, 838.]

EXTRADITION—TRIAL OF PERSON EXTRADITED FOR ANOTHER AND DIFFERENT OFFENSE. — Where one state procures the extradition from another state of an alleged fugitive from justice, to be prosecuted for some particular offense for which his extradition was obtained, he cannot be prosecuted in such state for another and different offense until after he has had a reasonable opportunity to return to the place from which he was extradited.

EXTRADITION. — IT IS CONSTITUTIONAL DUTY OF STATE, in every case, to extradite a fugitive from justice upon a legal requisition from another sister state, and it can ask no questions upon the subject, nor impose any terms.

A WARRANT was issued against J. S. Hall on an indictment charging him with forging and counterfeiting a warranty deed. Hall having removed to California, he was legally extradited back to Kansas, and the grand jury afterward found and returned another indictment against him, consisting of two counts. The first count charged him with the same offense for which he was extradited, and the second with passing, uttering, and publishing the warranty deed he was charged with forging. While the first indictment, and the one on

which he was extradited, was still pending and undisposed of, he was arrested on the second indictment, and a *nolle prosequi* was then entered as to the first indictment. Hall then filed a motion to quash the second indictment, and each and every count thereof, for the reason that at the time of his arrest on the warrant issued on the second indictment, the first was pending against him, wholly undisposed of; that thereafter, and without the consent of Hall, the first indictment was nollied and dismissed, and Hall discharged, and that said second indictment does not charge the same offense charged in the first one, nor was Hall extradited to answer the charges set forth in the second indictment. The court sustained said motion as to the second count of the last indictment, to which ruling the state excepted. Hall then waived arraignment, pleaded not guilty, went to trial on the first count, and was acquitted by the jury.

Joseph Moore and W. P. Quinby, for the state.

J. G. Mohler, and Lovitt and Sturman, contra.

VALENTINE, J. The judgment of the court below must be affirmed. The question presented is this: Where a fugitive from justice from the state of Kansas to another state has lawfully been extradited from such other state back to Kansas for the purpose that he may be required to answer to a criminal charge contained in a certain indictment, can he at once be put upon trial to answer to another and different criminal charge contained in another and different indictment, but a charge of an offense for which he could have been but was not extradited? In other words, can a person be extradited for one offense and immediately tried for a wholly different offense? We would think not. It is a general maxim of law that judicial process shall not be abused. But to try a person for an offense other than the one for which he was extradited would be an abuse of judicial process. Within this broad and general maxim above referred to is included the following more definite rule of law, to wit: Where the presence of a person has been changed from a place outside of the territorial jurisdiction of a court of justice to a place within such jurisdiction, and this change has been procured through the instrumentality of another person and upon a pretext of thereby accomplishing some particular purpose, such first-mentioned person cannot, after his presence has been thus obtained within the territorial jurisdiction of the court, and

before he has had an opportunity to return, be prosecuted in such court by the person who has thus been instrumental in procuring his presence, for the purpose of accomplishing some wholly different purpose. This rule of law has often been applied by the courts in civil cases: *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523, 526, and cases there cited; *Spear on Extradition*, 526, and cases there cited; *Compton v. Wilder*, 40 Ohio St. 130. This rule of law is applied in cases of separate jurisdictions, whether the separate jurisdictions are cities, counties, districts, states, or foreign countries. It is often the case, however, that the jurisdiction of a court extends to every portion of the state; but a court cannot have jurisdiction beyond the boundaries of its own state. Nor can it send its process into other states or countries. It cannot compel a fugitive from justice or any other person beyond the boundaries of its own state to attend its sessions. A fugitive from justice can be obtained from another state or country only with the consent of the executive authorities of such other state or country; and for a state to procure a fugitive from justice from some other state or country to be tried for some particular offense, by the consent of such other state or country, and then to try him for another and a different offense before he has had an opportunity to return, would be such an unwarranted abuse of judicial process, such a fraud upon justice, such an act of perfidy, that no court in any country should for a moment tolerate the same.

The foregoing rule of law applies in criminal cases where the fugitive from justice has been extradited from a foreign country: *United States v. Rauscher*, 119 U. S. 407; *United States v. Watts*, 8 Saw. 370; *Ex parte Hibbs*, 26 Fed. Rep. 421, 431; *Ex parte Coy*, 32 Id. 911, and note; *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273; 48 Am. Rep. 431; *Blandford v. State*, 10 Tex. App. 627. In the cases above cited, the fugitives from justice were extradited under treaties, but in these treaties there was no provision that the fugitive from justice should be tried only for the offense for which he was extradited; hence the foregoing decisions are perfectly applicable to this case. The foregoing rule of law also applies in criminal cases between states: *State v. Simmons*, 39 Kan. 262; *In re Cannon*, 47 Mich. 481. And it applies as strongly between states as it does between foreign countries. In *Lagrange's Case*, 14 Abb. Pr., N. S., 344, 346, Judge Daniels uses the following language: "In principle

there can be no practical difference between the case of a fugitive brought from a neighboring state under the constitution and laws of the United States, and one brought from a foreign country under the provisions of its treaties. In each the right of freedom to return is precisely the same, and the implied guaranty of that right under the laws is no greater in one case than it is in the other."

The foregoing rule of law stated broadly, as it is, is upheld and sustained by the great preponderance of authority in this country. When applied to civil cases, it is sustained by nearly the entire, if not the universal, current of authority. When applied to criminal cases where the extradition is from a foreign country, it is sustained by almost all authority. When applied, however, to criminal cases where the extradition is from a sister state, a majority of the cases is against the rule, and as we think, without any good reason. The state should not be allowed to obtain jurisdiction of a fugitive from justice for one purpose, and then to take advantage of that jurisdiction thus obtained and use it for another and a different purpose. A state has no more right to act fraudulently or unfairly than an individual person has, and what the state does by its officers or agents it does itself. Mr. Samuel T. Spear, author of the work on the law of extradition, and also Judge Cooley, have carefully considered this entire question, and have come to the same conclusion that we have: See Spear on the Law of Extradition, c. 12. Among the things which Mr. Spear has said upon this subject, we would quote the following: "No sufficient reason can be assigned why these principles of law should not be applied in extradition cases, so as to guard the process against abuse or diversion from the purpose intended by the constitution. The use of the process for any other purpose is an abuse. On this point Judge Cooley uses the following strong and emphatic language: 'To obtain the surrender of a man on one charge and then put him upon trial on another is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule, that where by compulsion of law a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraints for another purpose. The legal privileges from arrest when one is in the performance of a legal duty away from his home rest upon this rule, and they are merely the expressions of reasonable exemption from un-

fair advantages. The reason of the rule applies to these cases; and it should be held, as it recently has been in Kentucky, that the fugitive surrendered on one charge is exempt from prosecution on any other. He is within the state by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace': Princeton Review, January, 1879, p. 176. Courts, as will appear in the sequel, have not always adopted this view; and yet it is the only just and proper view in the premises, and the only view that is consistent with the letter and intent of the constitutional provision relating to extradition": Spear on Extradition, 527, 528.

"Now, to use the constitution and the law for the purpose of forcibly removing a person on the charge of a specific crime from one state to another in order that he may in the latter state be tried for that crime, and then to use the custody thus secured for a different purpose, is to make a case different from the one contained in the constitution and the law, different from the one that appeared in the extradition proceedings, different from the avowed purpose of the demanding state at the time of making the demand, and different from the case that was before the delivering state, and on which it passed judgment as to the obligation of delivery. The state that takes this course after obtaining possession of the fugitive gives the lie to its own official declaration; and if at the time of seeking the possession it meant to do so, then it meant to perpetrate a fraud upon the surrendering state.

"Such a course would plainly carry the jurisdiction exercised over the surrendered party beyond the point and beyond the purpose contemplated in the constitution and the law. That purpose, as expressly stated, is, that the party demanded and charged with a specific crime by one state, and arrested and delivered up by another state, may 'be removed to the state having jurisdiction of the crime' charged, and that he may be there put on trial for that crime. It is no part of this purpose that the party being delivered up in the manner specified should, at the pleasure of the state receiving him, be held and tried for other crimes, or that he should be arrested and held to bail in civil actions by creditors, whether these creditors procured his extradition or not. Either proceeding would be foreign to and in excess of the one purpose for which, under the constitution and the law, the demand was made by

one state, and the arrest and delivery were ordered by the executive authority of another state.

"The constitution furnishes the extradition remedy for the case which it describes, and for no other case; and the arrest of the extradited party in a civil action, or his trial for an offense different from the one specified in the proceedings, is a use of the custody thus secured that is not in that case. It must be put there, if at all, by judicial construction; and such construction we are compelled to regard as an abuse of the remedy.

"It is due to good faith between the states, to the sovereignty of the states as distinct political communities, to the terms of their intercourse with each other in demanding and surrendering fugitives from justice, and to the plain intent of the constitution in providing the extradition remedy, that when one state in this way obtains the custody of a person it should limit the use of that custody to the purpose for which it was obtained, and which was distinctly avowed by it when obtaining the same; and hence, when this purpose has been gained, the state demanding and receiving the fugitive should interpose no legal hindrance to his freedom of departure and return to the state from which he was thus removed. The matter for which he was brought into the state having been legally disposed of, then, in the language of Judge Cooley, he has a right 'to depart in peace.' Any other course, if originally intended, would be a fraud on the part of the demanding state, and if not so intended, would be an act of bad faith.

"Extradition is not an act between the extradited party and the person or persons who may have procured the extradition, but between two sovereign states, for the purpose of public justice in the case specified. These states are bound to act in good faith toward each other, no matter what may have been the motives of private parties in seeking the extradition. One of these states sets forth in its case, and if the other responds affirmatively by compliance with its demands, as it will be bound to do if the case comes within the provisions of the constitution and the law, then the former state will be equally bound in honor to confine the exercise of its jurisdiction to the case presented": Spear on Extradition, 548-550.

"The constitution and the law make it the duty of the asylum state to give the necessary consent and put forth the necessary action when, and only when, the prescribed condi-

tions are present; and one of these conditions is a specific and definite charge of a particular crime as the ground of the removal, and also a declaration of the purpose for which the removal is sought. The obvious implication arising from this condition is, that the state receiving the fugitive under the constitution and the law, like a nation receiving a fugitive under a treaty, should use the custody only for the purpose professed when acquiring it, and which was had in view by the delivering authority when making the arrest and surrender. This implication naturally arises from the constitution and the law; and if so, then it is binding on state courts as it would be if it had been stated in express words. What the constitution or the law, by a just and fair construction implies, is a part of that constitution or that law": Spear on Extradition, 552.

The provision of the United States constitution upon which interstate extradition is founded reads as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime": U. S. Const., art. 4, sec 2.

This provision does not expressly say that the extradited fugitive shall not be prosecuted in the state to which he was extradited for any offense other than the one for which he was extradited; nor does it say that he shall not be subject to other prosecutions of a civil character. But neither do treaties between the United States and foreign nations, so far as they have been construed, say any such thing; but the strong implications of both the constitutional provision and the treaties are to that effect, at least so long as the extradited fugitive is involuntarily kept within the state to which he has been extradited; and the state to which he has been extradited cannot fairly and honorably permit him to be subject to any such prosecutions. As between sister states, or as between a state and a foreign country, whatever the state permits to be done by or through its officers, agents, or courts of justice, it does itself, and is responsible therefor. As between sister states, there is more reason for applying the doctrine that an extradited fugitive can be prosecuted only for the offense for which he was extradited than there is between a state and a foreign country, for the reason that the state from which the fugitive was extradited has no effective remedy,

while a foreign country can protect itself by having a provision inserted in its treaties with our country preventing the extradited fugitive from being prosecuted for anything except the offense for which he was extradited, or by withdrawing all intercourse between it and our country. On the other hand, sister states cannot make treaties, nor can they avoid intercourse. It is the constitutional duty of a sister state in every case to extradite a fugitive from justice upon a legal requisition from another sister state; and it cannot ask any questions upon the subject, nor impose any terms.

The judgment of the court below will be affirmed.

RIGHT TO TRY EXTRADITED PERSONS FOR OTHER OFFENSES. — In regard to international extradition, it has recently been determined by the supreme court of the United States that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings: *United States v. Rauscher*, 119 U. S. 407. In this case, the party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, being charged with murder on board an American vessel on the high seas, and then fleeing to England. The circuit court of the United States for the southern district of New York, in which he was tried, did not proceed against him for murder, but for a minor offense not included in the treaty of extradition, and the judges of that court certified to the supreme court for its judgment the question whether this could be done; and the latter court held as follows: 1. That a treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement. 2. That on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of Congress on that subject (U. S. R. S., secs. 5272, 5275), he cannot lawfully be tried for any other offense than murder. 3. The treaty, the acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offense until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. The national honor also requires that good faith shall be kept with the country which surrendered him. 4. The circumstance that the party was convicted of inflicting cruel and unusual punishment on the same evidence which was produced before the committing magistrate in England in the extradition proceedings for murder does not change the principle. Mr. Chief Justice Waite dissenting: *United States v. Rauscher*, 119 U. S. 407. Mr. Justice Gray, while concurring in the decision of the court, declined to express an opinion upon the broader question whether, independently of any act of Congress, and in the absence of any affirmative restriction in the treaty, a man surrendered for one crime should

be tried for another; not being satisfied that this is a question of law within the cognizance of the judicial tribunals as contradistinguished from a question of international comity and usage within the domain of statesmanship and diplomacy: *Id.* 433.

Prior to this determination of the question, the decisions were in conflict. In some of them the doctrine is maintained that an extradited person cannot lawfully be detained or tried on any charge other than the one on which he was surrendered by the extraditing government: See, as sustaining this view, *Ex parte Hibbs*, Dist. Ct. Or., 1886; *United States v. Watts*, 8 Saw. 370; *Blandford v. State*, 10 Tex. App. 627; *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273; 48 Am. Rep. 431. The same doctrine is recognized in the recent case of *Ex parte Coy*, U. S. Dist. Ct. Tex., 1887, Coy having been extradited from the republic of Mexico. It is there held that a person extradited for one offense cannot waive his immunity from punishment for other offenses not embraced in the provisions of the extradition treaty. On the other hand, it was held in *United States v. Caldwell*, 8 Blatchf. 131, that the defendant, although extradited on a charge of forgery, might be indicted and tried on a charge of bribery: Followed in *United States v. Lawrence*, 13 Id. 295. So it was held by the New York court of appeals that a person brought within the United States on an extradition proceeding on the charge of burglary might be arrested therein in a civil action: *Adriance v. Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317. So in a more recent case it was held that a fugitive criminal, extradited under the treaty of 1842 between the United States and Great Britain, might be held on his prior conviction and sentence for a non-extraditable offense, after the charges for which he was delivered had been ignored: *In re Miller*, U. S. Cir. Ct. of Pa., 1885; 6 Crim. Law Mag. 511.

Whether the principle now established by the decision in the case of *United States v. Rauscher*, 119 U. S. 407, should equally apply to interstate extradition is a question upon which the cases are conflicting. It is maintained in the principal case that the rule applies as strongly between states as it does between foreign countries. And such is the doctrine held by the supreme court of Michigan: *In the Matter of Cannon*, 47 Mich. 481. So in an Ohio case, *W.*, a citizen of Pennsylvania, was extradited from that state upon a requisition issued by the governor of Ohio, upon application of C., A., & Co., in a criminal prosecution instituted by them in Hamilton County. And it was held that the service of a summons and an order of arrest, issued in a civil action brought by C., A., & Co. against *W.*, and made upon him directly after he had entered into a recognizance to appear before the court of common pleas at its next term, and before conviction, and before he had an opportunity to return to his home, was rightfully set aside: *Compton v. Wilder*, 40 Ohio St. 130. Other cases, however, maintain that the distinction between international and interstate extradition is very marked; that the doctrines of international extradition, as to the right to try extradited persons for other offenses, whether based on comity or on treaty stipulations, have no application to extradition cases arising between the different states of the Union under their common constitution, whose imperative mandate on this subject is founded on the mutual trust and confidence of the states, and guarded by the guaranty that each state shall secure to the citizens of her sister states the privileges and immunities she concedes to her own. It is accordingly held that a citizen of one state, extradited therefrom to another state, may be tried in the latter for a different offense than that alleged against him in the requisition on which he was extradited: *Ham v. State*, 4

Tex. App. 645; *Browning v. Abrams*, 51 How. Pr. 172; or, as held in a Wisconsin case, in the absence of any compact or other arrangement between the states, a person extradited from one state to another for a certain offense, after being tried, acquitted, and discharged, may be arrested and tried for another offense before he is allowed to return to the state from which he was brought: *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388. In this case, no treaty stipulation to guarantee a return was involved, and hence it was said that cases of international extradition arising under such treaties were inapplicable: Id. 590; and see *Hackney v. Welsh*, 107 Ind. 253; 57 Am. Rep. 101.

In a recent case, it was held that an accused person brought from the state of Michigan to Indiana, upon a requisition, to answer a charge of embezzling money, may be tried upon an indictment charging the embezzlement of property. This was simply charging the same offense in different ways, in order to meet the evidence as it might appear at the trial: *Waterman v. State*, 116 Ind. 51; compare *People v. Gray*, 66 Cal. 271. So in the case of interstate extradition, it is recently held that a prisoner extradited upon a certain charge may be tried for an offense slightly different from the charge, if nothing appears to suggest fraud in procuring the extradition: *Harland v. Territory of Washington*, 3 Wash. 131. "If," says Langford, J., in the case last cited, "a prisoner is extradited from one state to another, it is done, not through the terms of treaty, the breach of which is to be punished by war or revolution, but through the comity and pleasure of each state. And this comity of states is exercised with great liberality, and without the jealousy which controls foreign nations as to each other": Id. 154. But in further discussing the subject, he says: "A false pretense that a man is required for one thing, when in truth and in fact he is wanted for quite another thing, is a fraud, and in such case, the court would presume that the executive had been imposed upon, and upon an advantage being attempted as the fruit of such fraud, would discharge the prisoner": Id. A person committed a felony in Michigan, and voluntarily fled into Indiana, where he was arrested for a felony committed there. A warrant for his arrest issued on a requisition from Michigan, and was received by the officer detaining him, but the accused escaped to Ohio, from whence he was returned to Indiana upon requisition. Upon the failure of the prosecution against him in Indiana, it was held that he might be surrendered to the authorities of Michigan on the requisition from that state: *Hackney v. Welsh*, 107 Ind. 253; 57 Am. Rep. 101.

The doctrine established in *United States v. Rauscher*, 119 U. S. 407, that where an international treaty of extradition exists between independent nations, and a criminal has been delivered up under it, he cannot, without violating the treaty, be tried for any other crime but that for which he was delivered up without first being afforded an opportunity of returning, has no application where the criminal has been brought back forcibly, and not under the terms of the treaty, or under an extradition warrant: *Ker v. People*, 110 Ill. 626; 51 Am. Rep. 76; affirmed, 119 U. S. 436. Such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court: See *State v. Brewster*, 7 Vt. 118; *State v. Smith*, 1 Bail. 283; 19 Am. Dec. 679; *Dow's Case*, 18 Pa. St. 37; *State v. Ross*, 21 Iowa, 467; *State v. Wenzel*, 77 Ind. 428; *Ex parte Scott*, 9 Barn. & C. 446. It is maintained that the treaties of extradition to which the United States are parties do not guarantee a fugitive from the justice of one of the countries an asylum in the other.

And if he is illegally and forcibly removed from the country to which he has fled, that country alone has cause of complaint, and he cannot complain for it: *Ker v. People*, 110 Ill. 627; 51 Am. Rep. 706; affirmed, 119 U. S. 436. So in a more recent case, the doctrine is asserted that the constitution and laws of the United States have provided no mode by which a person unlawfully abducted from one state to another, and held in the latter state upon process of law for an offense against the state, can be restored to the state from which he was abducted; and that there is no comity between the states by which a person held upon a indictment for a criminal offense in one state can be turned over to the authorities of another state, although abducted from the latter: *Mahon v. Justice*, 127 U. S. 700, Mr. Justice Bradley, with whom concurred Mr. Justice Harlan, dissenting.

It should be observed that with most civilized nations of the world with which the United States have intercourse the matter of extradition of fugitives from justice is regulated by treaties, and the extradition must be negotiated through the federal government, and not by that of a state, though the demand may be for a crime committed against the law of that state. If the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government, by a writ of error from the supreme court of the United States to the state court which may have committed such an error. The case being thus removed into the supreme court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided; or the prisoner may sue out a writ of *habeas corpus* from any federal court or judge, on the ground that he is restrained of his liberty in violation of the constitution or a law or a treaty of the United States, which will bring him before a federal tribunal, where the truth of that allegation can be inquired into, and if it be well founded, he will be discharged: *Ex parte Royall*, 117 U. S. 241, 251; *United States v. Rauscher*, 119 Id. 407, 431. State courts also could issue such a writ, and thus the judicial remedy is complete, when the jurisdiction of the court is admitted: *United States v. Rauscher*, 119 U. S. 431; see *Matter of Fetter*, 23 N. J. L. 311; 57 Am. Dec. 382, and note 389-400.

McLAUGHLIN v. DOANE.

[40 KANSAS, 392.]

RES ADJUDICATA — **JUDGMENT ON DEMURRER, WHEN FINAL.** — Where, to an action upon a judgment, a demurrer is interposed and sustained upon the ground that the court had no jurisdiction to render the judgment, and judgment is rendered upon the demurrer in favor of the defendant, such judgment goes to the merits of the action, and must be considered as complete and final as though the matter had been submitted to a jury, and a verdict and judgment had thereon. It not only precludes the bringing of another action upon the judgment demurred to, but also bars the interposition of that judgment as a defense to a new action upon a note, the subject of the judgment.

Action by Daniel McLaughlin and two others, partners as McLaughlin Brothers, against George B. Doane and one Den-

nis, upon a promissory note. The note was executed in Nova Scotia, where all the parties at the time resided; but after its execution, the defendant Doane became a resident of Rice County, Kansas. The note becoming due and remaining unpaid, action was brought thereon in Nova Scotia against Doane and Dennis. Personal service was made upon Dennis, and a summons was sent to Rice County, and was indorsed by the defendant in error as follows: "State of Kansas, Rice County. I, George B. Doane, of the city of Lyons, county and state aforesaid, do hereby accept due and legal service of the within notice. Witness my hand this tenth day of June, 1882. George B. Doane." Upon this service a personal judgment was rendered in Nova Scotia against both Dennis and Doane. The judgment remaining unpaid, in 1885 a transcript was sent to Kansas, and an action brought thereon against Doane. The defendant appeared and demurred to the petition, for the reasons,—1. That it failed to state facts sufficient to constitute a cause of action; and 2. That it appeared, from the face of the petition and exhibits, that the court of Nova Scotia had no jurisdiction of the defendant to render a personal judgment, and for that reason the judgment was void. The demurrer was sustained, and judgment rendered thereon against the plaintiffs for costs. The plaintiffs then brought this action on the note, being the same note upon which judgment had been rendered in Nova Scotia; and to this action the defendant pleaded,—1. A general denial; and 2. The petition and judgment in the former suit by the plaintiffs against him, claiming that said judgment in Nova Scotia was a valid and subsisting judgment. To this defense plaintiffs demurred, which demurrer was overruled. Plaintiffs then filed a reply, alleging the same defense now set up in the claim of the defendant, that it was the same judgment as that sued on in the former action, and that in that action a demurrer had been sustained upon the sole and only ground that the court of Nova Scotia had no jurisdiction to render and pronounce a judgment, and that the judgment upon demurrer was upon that ground, and that by reason of that judgment the defendant was barred from now pleading the judgment as a defense to this action. To this reply the defendant demurred, on the ground that the reply stated no defense to the answer, which demurrer was by the court sustained. To the overruling of the plaintiffs' demurrer

to the answer, and the sustaining the demurrer to their reply, they excepted, and bring the case up for review.

M. A. Thompson, for the plaintiffs in error.

J. H. Bailey, for the defendant in error.

CLOGSTON, C. This seems to us to be a novel proceeding. If the defendant in error is right in his answer, and the court properly overruled the plaintiffs' demurrer, and properly sustained the demurrer to the plaintiffs' reply, then the defendant would be relieved from his liability, both as to the judgment and the note, the subject of the judgment. When the defendant demurred to the plaintiffs' petition on the judgment, and the court sustained the demurrer upon the ground that the court of Nova Scotia had no jurisdiction to render the judgment, and a judgment was rendered upon that demurrer, we think that judgment was upon the merits, and disposes of the action, and that while that judgment remains unreversed, it is complete and final. It not only precludes the plaintiffs from again bringing an action upon that judgment, but it also bars the defendant from in any manner pleading that judgment as a defense to this action. He cannot consider it binding as against the plaintiffs and not as against himself. He insists, however, that while the court did sustain that demurrer, and dispose of that judgment, yet it was possible for the plaintiffs to have so amended their pleadings as to have shown that the judgment was good. We think this claim will not avail the defendant. If he knew the judgment was good, and procured the court to make and render a decision to the contrary, he cannot take advantage of it here. He was willing that the court should find that the judgment was void for want of service, and he cannot now be heard to say that the judgment was good. He cannot be allowed to play fast and loose with the court. The judgment upon the demurrer must be considered as final as though the matter had been submitted to a court or a jury, and they had made findings, and judgment had been rendered thereon: *Wells on Res Adjudicata*, sec. 446; *Gould v. E. & C. R. R. Co.*, 91 U. S. 526; *Aurora City v. West*, 7 Wall. 82; *Phila., W., & B. R'y Co. v. Howard*, 13 How. 337.

We therefore recommend that the judgment of the court below be reversed, and the court be directed to overrule the demurrer to the plaintiffs' reply.

It is so ordered.

RES ADJUDICATA. — A judgment is equally as conclusive rendered upon a demurrer to a complaint as a verdict based upon a finding by the court or jury from the facts would be, and is equally subject to the rule of being considered *res judicata*: *Gould v. Evansville etc. R. R. Co.*, 91 U. S. 526, and cases therein cited.

BAKER v. STEWART.

[40 KANSAS, 442.]

HUSBAND AND WIFE. — AT COMMON LAW, UNDER CONVEYANCE OF REAL ESTATE TO HUSBAND AND WIFE, they do not take either as joint tenants or tenants in common, unless by express words, or words strongly implying such intention. Without such words, the estate conveyed is a tenancy in entirety, and on the death of one the survivor becomes sole seised of the entire estate. And this rule of law as to the rights of the survivor has not been changed by the statutes relating to married women, nor by those relating to descents and distributions, nor by any other statutes.

ACTION brought by Mary E. Stewart against Frank A. Baker, to recover damages for an alleged breach of certain covenants in a general warranty deed executed by Baker and wife to the plaintiff for certain lands. Other facts appear in the opinion. The court below rendered judgment in favor of the plaintiff, and the defendant, as plaintiff in error, seeks to have this judgment reversed.

William H. Clark, for the plaintiff in error.

C. B. Mason, for the defendant in error.

VALENTINE, J. It appears that on November 23, 1877, Joshua Baker and his wife, Elizabeth Baker, who owned certain real estate in Franklin County, conveyed the same by a general warranty deed to their son, Frank A. Baker, and his wife, Alice Baker, which deed was duly recorded. Afterward, and prior to October 3, 1881, Alice Baker died, leaving surviving her her husband, and two children born during the marriage. Upon these facts, and some others not necessary to mention, the main question arising in the case, and the one now presented to this court, is, whether, on the one side, the foregoing deed conveyed the foregoing real estate to Frank A. Baker and his wife as tenants in common, or whether, on the other side, it conveyed it to them as joint tenants or tenants in entirety. If the deed conveyed the land to Frank A. Baker and his wife as tenants in common, then the

decision of the court below is correct, and must be affirmed; but if it conveyed it to them either as joint tenants or as tenants in entirety, then such decision is admitted to be erroneous. The real question, stated more explicitly, is this: At the death of Alice Baker, who took the foregoing real estate? Did Frank A. Baker, as the survivor of the two, and as one of two joint tenants or tenants in entirety, take the whole of the estate? or did he, as a tenant in common with his wife, take only the one half thereof, and leave his wife's heirs to take the other half? No question has ever been presented in this case as to who had the right to control the property during the joint lives of Frank A. Baker and his wife, or whether either or both together could have legally sold the same, or any interest therein, during that time. These matters, however, will be considered to some extent hereafter. We suppose it will be admitted that a deed might be executed to a husband and wife which would convey to them, if the language of the deed explicitly said so, any one of the foregoing estates,—that is, an estate in common, or a joint tenancy, or a tenancy in entirety,—for such has always been the law, and property owners can generally convey their property just as they please.

Walker, J., however, in the case of *Smith v. Smith*, 30 Ala. 642, 643, used the following language: "The reason why, under a conveyance to husband and wife, they did not take, either as joint tenants or tenants in common, is, that they were, according to the principles of the common law, incapable of so taking."

Mr. Bishop, in his work on *Married Women*, volume 2, section 285, criticises this language as follows: "Let us pause to say that the majority of legal persons would probably deny this proposition of the learned judge; because, as we saw in the first volume [vol. 1, secs. 616, 618], husband and wife, if they were joint tenants or tenants in common before marriage, continue to be the same after marriage, and do not become tenants by the entirety of the estate, which shows them to be capable of holding as tenants in common or as joint tenants; and it is perhaps the better doctrine at the common law, that a conveyance to them after marriage may, by express words, create in them either of these two tenancies."

Mr. Washburn, in his work on *Real Property*, volume 1, page *425, uses the following language: "It is always competent, however, to make husband and wife tenants in common,

by proper words, in the deed or devise by which they take, indicating such an intention."

Chancellor Kent, in his Commentaries, volume 4, page *363, uses the following language: "It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture." See also *McDermott v. French*, 15 N. J. Eq. 78, 80. Certainly, a husband and wife may be made tenants in common by a separate deed to each, conveying to each a separate moiety of the estate. This may also be accomplished by a separate conveying clause as to each in the same deed; and certainly no good reason can be given why the same thing might not be accomplished by any express words in a single deed executed to the two together, showing the intention of the parties to be that the husband and wife should take the estate as tenants in common; but it would require express words, or words strongly implying such an intention. Without such words the estate conveyed would be an estate in entirety. We suppose it will also be admitted that the deed in the present case would, at common law, have conveyed the property in entirety to Frank A. Baker and his wife, Alice Baker, and would not have conveyed it to them as ordinary joint tenants or as tenants in common. We suppose it will also be admitted that if the deed in the present case conveyed the estate to Frank A. Baker and his wife, either in entirety or as joint tenants, then that Frank A. Baker, as the survivor of the two, was, at the death of his wife, entitled to the land, and the defendant in error, plaintiff below, should not recover in this action. But if the deed did not so convey such estate, and conveyed the same to Baker and wife purely, solely, and entirely as tenants in common, then the plaintiff in error, defendant below, was not, at the death of his wife, entitled to the land, and the defendant in error, plaintiff below, should recover in this action. Almost all authority is in favor of the theory that such deed conveyed an estate in entirety to Frank A. Baker and wife, and that he, as the survivor of the two, was, at the death of his wife, entitled to the entire estate. Among the decided cases supporting this view of the case are the following: *Myers v. Reed*, 17 Fed. Rep. 401; *Gibson v. Zimmerman*, 12 Mo. 385; 51 Am. Dec. 168; *Garner v. Jones*, 52 Mo. 68; *Hall v. Stephens*, 65 Id. 670; 27 Am. Rep. 302; *Robinson v. Eagle*, 29 Ark. 202; *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61; *Brownson v. Hull*, 16 Vt. 309; 42 Am.

Dec. 517; *Shaw v. Hearsey*, 5 Mass. 520; *Fox v. Fletcher*, 8 Id. 274; *Draper v. Jackson*, 16 Id. 480; *Wales v. Coffin*, 13 Allen, 213; *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, 141 Id. 219; 55 Am. Rep. 462; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Zornitlein v. Bram*, 100 N. Y. 12; *Kip v. Kip*, 33 N. J. Eq. 213; *Buttlar v. Rosenblath*, 42 Id. 651; 59 Am. Rep. 52; *Bates v. Seely*, 46 Pa. St. 248; *Diver v. Diver*, 56 Id. 106; *French v. Mehan*, 56 Id. 286; *McCurdy v. Canning*, 64 Id. 39; *Fleek v. Zillhaver*, 117 Id. 213; *Hannan v. Towers*, 3 Har. & J. 147; 5 Am. Dec. 427, *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266; *Den v. Whitemore*, 2 Dev. & B. 537; *Den v. Branson*, 5 Ired. 426; *Woodford v. Higly*, 1 Winst. 237; *Doe v. Garrison*, 1 Dana, 35; *Banton v. Campbell*, 9 B. Mon. 587, 594; *Babbit v. Scroggin*, 1 Duvall, 272; *Taul v. Campbell*, 7 Yerg. 319; 27 Am. Dec. 508; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269; *Berrigan v. Fleming*, 2 Lea, 271; *Hemingway v. Scales*, 42 Miss. 1; 2 Am. Rep. 586; *McDuff v. Beauchamp*, 50 Miss. 531; *Allen v. Tate*, 58 Id. 585; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Id. 241; *Manwaring v. Powell*, 40 Id. 371; *Jacobs v. Miller*, 50 Id. 119; *Bevins v. Cline*, 21 Ind. 37, 41; *Davis v. Clark*, 26 Id. 424; 89 Am. Dec. 471; *Arnold v. Arnold*, 30 Ind. 305; *Falls v. Hawthorn*, 30 Id. 444; *Simpson v. Pearson*, 31 Id. 1; 99 Am. Dec. 577; *Chandler v. Cheney*, 37 Ind. 391; *Barnes v. Loyd*, 37 Id. 523; *Jones v. Chandler*, 40 Id. 588; *Anderson v. Tannehill*, 42 Id. 141; *Hullet v. Inlow*, 57 Id. 412; 26 Am. Rep. 64; *Patton v. Rankin*, 68 Ind. 245; 34 Am. Rep. 254; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210.

On the side of the defendant in error, cases are cited from Iowa, Illinois, and New Hampshire, which are relied on as supporting the opposite view of the case. But these cases were decided under special statutes, and therefore are not authority at all. Under such statutes there could not be any joint tenancy or tenancy by entirety, but only a tenancy in common, and therefore the decisions in those states could not have been otherwise than as they were. The statute of Iowa upon this subject reads as follows:—

“Sec. 1939. Conveyances to two or more, in their own right, create a tenancy in common, unless a contrary intent is expressed”: McClain's Annotated Stats. Iowa, 1882, sec. 1939.

The statute of Illinois upon this subject reads as follows:—

"Sec. 5. No estate in joint tenancy, in any lands, tenements, or hereditaments, shall be held or claimed under any grant, devise, or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common": Starr & C. Annot. Stats. Ill., 1885, p. 571, c. 30, par. 5.

The statute of New Hampshire upon this subject reads as follows:—

"Sec. 14. Every conveyance or devise of real estate made to two or more persons shall be construed to create an estate in common, and not in joint tenancy, unless it shall be expressed therein that such estate is to be holden by the grantees or devisees as joint tenants, or to them and the survivor of them, or other words are used clearly expressing an intention to create a joint tenancy.

"Sec. 15. Joint heirs shall be deemed tenants in common": Gen. Laws N. H., 1878, p. 325, c. 135, secs. 14, 15.

It seems to be admitted that at common law the deed in the present case would convey an estate in entirety to Frank A. Baker and his wife, but it is claimed that the rule of the common law has been changed by our statutes. No statute, however, has been referred to, nor can any statute be found that enacts directly that such a deed should not convey such an estate. Indeed, there is no statute that pretends in direct terms to change or modify the common law in any particular with respect to such a deed. It is claimed, however, that the married woman's act by indirection or impliedly changes or modifies this rule of the common law. Now, how such act changes or modifies the rule of the common law in this regard it is difficult to understand. That act was passed by the legislature presumably for the benefit of married women, and not to take away from them any of their rights or privileges. Now, nine tenths of the married women of this country are younger than their husbands. And the life-tables, wherever they state the expectancy of life for males and females separately, show that the expectancy of life for women is greater than that for men of the same age and health. See, especially, Dr. William Farr's tables in any volume of the American Almanac from 1879 up to the present time.

Hence, in the great majority of instances married women must survive their husbands. Now, if the married woman's act transforms an estate in entirety into an estate in common, then it will, in a great majority of instances, divest married women of one half of their estates. Without the act, a married woman holding with her husband an estate in entirety would, when he dies (if she survives him), take the entire estate; but with the act, if it is to be construed as the defendant in error would desire to have it construed, she would take under such circumstances only one half of the estate, and must lose the other half.

As will be shown hereafter, however, this act has nothing to do with the estate which either the husband or the wife shall hold, but only with the possession, control, and enjoyment by married women of their own separate property of estates which they in fact own. For the purposes of this case it will be admitted, and it is our opinion, that under the statutes of this state relating to married women they have all the rights, powers, and privileges that married men have, and may control their separate property, and buy and sell and trade and traffic to the same extent that married men may, and with like effect and consequences. But none of these things affect this case. It will be admitted that Alice Baker, while living, had the right to control the real estate in question to the same extent that her husband, Frank A. Baker, had; but that does not affect this case in the least. It does not determine what estate of inheritance passed from Joshua Baker and wife to Alice Baker or to Frank A. Baker. It only determines that each had during their joint lives an equal right to control the estate that did in fact pass. The estate that did in fact pass was an estate for life to each of them, with a contingent estate in fee-simple, or of inheritance to each of them, the latter estate depending upon the contingency as to which should outlive or survive the other. So long as each lived, each had the right to possess and enjoy the entire estate; but when one died, the other took the entire estate. Undoubtedly, such an estate could have been created by the deed from Joshua Baker and wife to them, if the deed has expressly said so, and under all the authorities the deed that was actually executed would at common law have conveyed just such an estate as conclusively and certainly as though it had expressly said so. And nearly all the authorities hold that the statutes relating to married women, and giving to them the right to control and

manage their own separate property, do not in the least affect the question as to what estate passes by a deed to a husband and wife, or what either shall take on the death of the other, and these authorities hold that such estate is still one of entirety. Among the authorities to this effect we would cite the following: *Diver v. Diver*, 56 Pa. St. 106, 109; *McCurdy v. Canning*, 64 Id. 39, 41; *Kip v. Kip*, 33 N. J. Eq. 213; *Buttler v. Rosenblath*, 42 Id. 651; 59 Am. Rep. 52; *Chandler v. Cheney*, 37 Ind. 391, 412, et seq.; *Carver v. Smith*, 90 Id. 222; 46 Am. Rep. 210; *McDuff v. Beauchamp*, 50 Miss. 531; *Fisher v. Provin*, 25 Mich. 347; *Robinson v. Eagle*, 29 Ark. 202; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Zornitlein v. Bram*, 100 N. Y. 13; *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266; *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692; see also 2 Bishop on Married Women, secs. 284-289. In the case of *Buttler v. Rosenblath*, 42 N. J. Eq. 651 (decided in 1887), 59 Am. Rep. 52, it is decided as follows:—

"1. A conveyance of land, since the passage of the married woman's act of 1852, to husband and wife does not create a tenancy in common.

"2. That act endows the wife with the capacity, during the joint lives, to hold in her possession, as a single female, one half the estate in common with her husband; the right of survivorship still exists as at common law.

"3. To constitute a tenancy in common between husband and wife, there must be in the conveyance an expression of an intention to do so."

In the case of *Diver v. Diver*, 56 Pa. St. 106, 109, Mr. Justice Strong, who was afterward one of the justices of the supreme court of the United States, in delivering the opinion of the court, used the following language: "But it is said the act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the act. To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property by removing it from under the dominion of the husband. To effectuate this object, she was enabled to own, use, and enjoy her property, if hers before marriage, as fully after marriage as before. And the

act declared that if her property accrued to her after marriage, it should be owned, used, and enjoyed by her as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them, and regulates the enjoyment; that is, the enjoyment of the estate after it has vested in the wife. And the mode of authorized enjoyment is significant. It is to be as her separate property is enjoyed,—as property settled to her separate use. The act, therefore, no more destroys her union with her husband than does a settlement of property for her separate use. To a certain extent she is enabled, but no more than is necessary, to protect her property after it has been acquired. We have held that she can convey her lands only by joining in deed with her husband: *Pettit v. Fretz*, 33 Pa. St. 118. This is a clear recognition of the existing unity of the two. It need not be repeated that no greater effect is to be given to the act of 1848 than its language and spirit demand. It is a remedial statute, and we construe it so as to suppress the mischief against which it is aimed, but not as altering the common law any further than is necessary to remove that mischief. To hold it as operating upon the deed conveying land to a wife, making such deed assure a different estate from what it would have assured without the act, is to lose sight of the legislative purpose. Were we to do so, it would become in many cases a means of divesting her of her property instead of an instrument of protection. In the present case, if it has converted the estate granted to Diver and his wife into a tenancy in common, it has taken from her her ownership and enjoyment of the entirety during her husband's life, and her right of survivorship to the whole."

The case of *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210, is a late case, and equally explicit upon this subject. And see also the latest New York cases upon this subject.

As we have before stated, the question as to who had the control of this property, or how it should be controlled while Alice Baker was alive, is not a question in this case. The only question in this case is, Who took the property after her death? But suppose that this question shall nevertheless be

considered. The right or privilege or power of the husband, at common law, to control the use of the wife's real estate was never any part of the estate held by either, but was always simply a right or privilege or power growing out of and founded upon the marriage relation. At common law, the husband had such right of control over all the wife's real estate, and not merely over such of her real estate as was held by the two in entirety. Now, cannot this right to the control of the wife's real estate be changed by statute without abolishing or destroying the nature of the estate held by the husband or the wife, or both,—the inheritance? Nearly all the authorities say that this may be done. May not the common law upon any given subject be amended or altered by statute without wholly destroying the entire common law upon that subject? May not the common law on any subject be altered in part and left in force in part? The common law in this state has probably been so amended that the husband and wife have an equal right to control all the land which they own in entirety, but in other respects the estate of entirety is probably precisely the same as it was before the statutes relating to married women took effect. With this change in the right of the husband to control the real estate owned by his wife or by him and her in entirety, the estate of entirety has become more like the ordinary estate of joint tenancy, though it is not yet, strictly, like such an estate. It does not matter in this case, however, which of these two estates the present is or was. If it was either an estate in entirety or an estate in joint tenancy, then the claim of the defendant in error is untenable. The claim of the defendant in error is tenable only upon the theory that the estate in the present case was one of pure tenancy in common.

It is also urged, faintly, but still urged, that the statutes relating to descents and distributions have transformed the estate in entirety into an estate or tenancy in common. How this has been done, however, is not made plain. It is difficult to understand just how any person may transmit to another, by death or otherwise, more than such first-mentioned person ever owned. Only a descendible estate can pass to an heir. In estates in entirety held by a husband and wife, each owns a life estate in the entire property; but the statutes relating to descents and distributions do not pretend to affect such estates. They do not enact that a life estate shall pass to an heir; and of course such an estate cannot. Each (the hus-

band or wife) also owns a contingent estate in fee-simple in the entire estate based upon the survivorship of one as to the other. The survivor takes the whole estate, and the heirs of the other take nothing. The one who dies first renders it utterly impossible for the contingency of survivorship on that one's part—the contingency upon which that one's inheritable estate is founded—ever to take place, and renders it utterly impossible for that one ever to obtain any inheritable interest in the property, or any interest which could by any possibility be transmitted to heirs. By that one's death, that one's contingent inheritable estate is ended and determined, and ended and determined before any absolute inheritable estate ever became vested in him or her, and hence that one, at his or her death, could have nothing which could be transmitted to heirs. There have always been laws in all the states with reference to descents and distributions, and yet it has never before been supposed that such laws prevented or hindered the creation of estates in entirety. Nearly all the courts hold that estates in entirety may still exist, and may be created by an ordinary deed of general warranty to the husband and wife; and such estates are no more against our present laws in Kansas relating to descents and distributions than such estates have always been against all other laws concerning descents and distributions in this and other states. So far as the homestead is concerned, our laws concerning descents and distributions recognize the right of the survivor, either the husband or the wife, and in whosoever name the title may be vested, to occupy such homestead, and the whole of it, after the death of the other: See act concerning descents and distributions, secs. 2, 28. The homestead is a kind of "community" property. No other statutes have been referred to as abolishing estates in entirety, and we think there are none.

Under the facts of this case, we think that Frank A. Baker, as the survivor of his wife, Alice Baker, is entitled to the entire estate, and that no part of the estate passed to her heirs.

The judgment of the court below will be reversed, and the cause remanded, with the order that judgment be rendered in favor of the defendant below, and against the plaintiff below for costs.

HORTON, C. J., in a dissenting opinion, opposes the old law of Great Britain concerning estates in entirety, and argues that such estates are not applicable to our society and institutions; citing *Dias v. Glover*, 1 Hoff. Ch. 71. He maintains "that husband and wife cannot, at common law, by any

words in a grant to them during coverture, be made either joint tenants, or tenants in common, for the reason that, according to the principles of the common law, they are incapable of so taking, husband and wife being considered as one person"; citing *Green v. King*, 2 W. Black. 1211; *Jackson v. Stevens*, 16 Johns. 115; *Ames v. Norman*, 4 Sneed, 692; *Barber v. Harris*, 15 Wend. 617; *Stucky v. Keefe*, 26 Pa. St. 397; *Rogers v. Benson*, 5 Johns. Ch. 437; *Pollard v. Merrill*, 15 Ala. 174. Continuing, he says: "One of my objections to establishing or recognizing estates in entirety in this state is, that it is not in consonance with our laws that the intention of the parties to a conveyance to a husband and wife cannot have any operation; and the adoption of estates in entirety determines the incapacity of husband and wife to take either as joint tenants or tenants in common": 2 Kent's Com. 132; 4 Id. 362; but even "if it be conceded that a conveyance can be made to husband and wife under the common law by proper words so as to create them tenants in common, then the reason on which the rule of an estate in entirety was founded has ceased to exist, and there being no reason for the rule, such estate should not be adopted or recognized." Moreover, it is claimed by him that the authorities cited as supporting estates in entirety are not to be accepted as conclusive in the state of Kansas. "In this state," he says, "the statutes and decisions recognize the separate existence of the wife, her separate property, her separate contracts, and her separate suits. Therefore the nice distinction created in the ancient books of estates in entirety are not, in my opinion, in line with our constitutional and statutory law, judicial decisions, and the condition and wants of the people." And in support of his views he cites the following decisions of the courts of other states: *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stizers*, 28 Iowa, 302; *Clark v. Clark*, 56 N. H. 105; *Walthall v. Gorer*, 36 Ala. 728; *Whittlesey v. Fuller*, 11 Conn. 337; *Sergeant v. Steinberger*, 2 Ohio, 305; 15 Am. Dec. 553; *Penn v. Cox*, 16 Ohio, 30; also *Norris v. Corkill*, 32 Kan. 409; 49 Am. Rep. 489. The case of *Diver v. Diver*, 56 Pa. St. 106, holding a contrary view, is said to be inapplicable to the state of Kansas, and "is no authority for this court to follow, which, unlike the Pennsylvania courts, has never dwarfed or limited by construction the statutes respecting the rights of married women."

Continuing the discussion, he says: "It is claimed, however, that some of the decisions favorable to the view I maintain are not in point, because of express statutes concerning joint tenancy and tenancy in common. If I read these decisions correctly, several of them are made solely upon the ground that the statutes giving to the wife her separate property rescind or abrogate the rule that a conveyance to husband and wife makes them tenants by the entirety, with right of survivorship. Further than this, it has been expressly decided by courts adopting estates in entirety, that statutes abolishing joint tenancy have no application to a joint estate of husband and wife, or an estate in entirety: *Diver v. Diver*, 56 Pa. St. 106; *Marburg v. Cole*, 49 Md. 402; 33 Am. Rep. 266. Therefore, if the decisions adopting or sustaining estates in entirety are to be followed, the various statutes referred to in the opinion concerning joint tenancy and tenancy in common cannot have much force, because estates in entirety are founded upon the incapacity of the husband and wife to take separately, or by moieties, and in these statutes estates in entirety are not expressly stated. If the doctrine of estates in entirety be the proper one, then the statutes referring to conveyances made to two or more are not applicable to estates in entirety, because those estates are also founded upon the doctrine that husband and wife are one in law, and one only; therefore, conveyances to two or more do not apply to a conveyance

made to husband and wife if they are only one in law. Again, at common law, the right to control the possession of the estate of the wife under such a conveyance during their joint lives is in the husband as it is when the wife is sole seised. The husband, by that law, has, during coverture, the usufruct of all the real estate which his wife has in fee-simple, fee-tail, or for life; so, also, under the common law, the husband has a right to make a lease of the estate conveyed in fee to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him: *Barber v. Harris*, 15 Wend. 616; *Washburn v. Burns*, 34 N. J. L. 18; and see *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462; *Topping v. Sadler*, 5 Jones, 357; *Jones v. Strong*, 6 Ired. 367. This view of the matter is contrary to the decision in *Diver v. Diver*, *supra*, but that decision, upon the power of the wife to use and possess the property conveyed to her and her husband during coverture, is in conflict with the majority of decisions recognizing estates in entirety."

He thus concludes: "If we are to follow precedent in preference to principle, and adopt the old law of Great Britain concerning estates in entirety, it seems to me that the weight of authority should also be followed, to the effect that the wife has no interest or control over such estate during the joint lives of herself and husband. The ancient theory that husband and wife are one person in law, and one only, in view of our society and institutions, is, in my opinion, a mere fiction or myth, without any substance or reason, which it is useless and illogical to perpetuate. If husband and wife in taking, holding, and possessing property are two persons instead of one only, as our constitution and laws recognize, and if husband and wife can take the estate by moieties, as our laws permit, then the reason for the existence of an estate in entirety has wholly ceased, and such estates should not be recognized in this state. Such an estate was called 'an oasis in the desert of the common law,' when that law conferred wealth and power upon the husband, and poverty and dependence upon the wife. But in the condition of things under our constitution, laws, and society, the excuse or reason for such estates is not to me apparent. For the foregoing reasons, I wholly dissent from the views expressed in the opinion, and also dissent from the judgment rendered."

HUSBAND AND WIFE. — ESTATE BY ENTIRETIES: See note to *Enyeart v. Kepler*, *ante*, p. 99.

WESTON v. LANE.

[40 KANSAS, 479.]

QUO WARRANTO — TITLE TO OFFICE IN SCHOOL BOARD. — Court is invested with some discretion in granting the extraordinary remedy of *quo warranto*, and will refuse the remedy to one who seeks thereby to become invested with the office of member of a district school board, such person claiming at the same time to maintain and continue contract relations with said board, previously entered into, requiring him to perform work and furnish materials used therein, under the supervision and control of the members of said board. The statute (Kansas Comp. Laws of 1885, c. 31, sec. 334) forbids that he should occupy the incompatible positions of member of the board and also contractor with it.

ORIGINAL proceedings in *quo warranto*. The facts appear in the opinion.

W. J. Gregg and John A. Broughten, for the plaintiff.

John V. Coon, for the defendant.

JOHNSTON, J. James A. Weston brought an action in this court on August 21, 1888, against James M. Lane, to determine the right between them to the office of clerk of School District No. 35, of Marshall County, Kansas. Prior to June 28, 1888, James M. Lane had been duly elected to the office, and until then was legally holding the same. On the day last mentioned, the annual school meeting occurred, when a successor of Lane was to be chosen, and an election was then held for that purpose, at which 173 votes were cast. The result was canvassed, showing that Weston received 101 votes, and Lane 72 votes; and the chairman of the meeting declared that Weston had received a majority of twenty-nine votes, and was duly elected to the office. He qualified at once, as the law requires, and demanded the office from Lane; but Lane refused to surrender the same, or to deliver the records of the office to Weston. The grounds upon which the demand was refused are, that on June 14, 1888, Weston and one Morton entered into a contract with the school board to erect an addition to the public school building of the district, at an agreed price of \$4,310. At the same time they entered into a bond in the penal sum of five thousand dollars for the faithful performance of their contract, which was duly approved by the district board. The plaintiff and his partner then proceeded with the contract, and had only partially completed the structure which they had contracted to build when the election occurred. It is admitted by the plaintiff that since the election he has continued in the performance of the contract, has received payments on estimates of work done, and proposes to proceed under the contract until its completion. Under these facts, is the plaintiff entitled to a judgment investing him with the office?

The legislature has provided that "all officers holding and exercising any office of trust or profit, under and by virtue of any law of the state, be and they are hereby prohibited from taking any contract, or performing or doing, or having performed or done for their own profit, any work in and about the office holden by them, or in or about any work over which

they have, in whole or in part, the supervision, direction, or control, and from furnishing any materials used in any such work": Comp. Laws of 1885, c. 31, sec. 334.

This provision directly forbids a member of the school board from entering into or carrying out a contract with the district, such as the one in question. It is true, as the plaintiff contends, that the contract relation which he sustained toward the district did not render him ineligible for election to the office. The contract was a lawful one when entered into; and there is no law prohibiting the election of one who sustains such a relation to an office. It is enacted that any person possessing the qualifications of an elector may be chosen a member of the district board. When the plaintiff was elected, he might have transferred his interest under the contract to another, and have severed the contract relations which existed between him and the district. The voters of the district had a right to assume that he would do so; and if this had been done, he would have been entitled to the possession of the office and to the remedy which he now seeks. Instead of doing this, however, he insists upon occupying the incompatible positions of clerk and contractor. He boldly declares in his petition that he proposes to complete the contract which he has entered into, and at the same time asks to be installed as one of the officers who are to supervise, control, and pay for the materials furnished and labor done under that contract. If he was invested with the office, and should proceed as he proposes, he would subject himself to removal and to punishment.

The court is invested with some discretion in granting this extraordinary remedy; and it would exercise its discretion unwisely to assist the plaintiff in violating the law as he proposes. It would also be idle to clothe him with an office from which he would be at once subject to removal, and when the performance of its duties would lay him liable to prosecution and to punishment. Judgment must, therefore, be given in favor of the defendant.

QUO WARRANTO. — The issuance of this writ rests in the sound discretion of the court, and was so in England: *Commonwealth v. Oluley*, 56 Pa. St. 270; 94 Am. Dec. 75.

SHATTUCK v. CHANDLER.

[40 KANSAS, 516.]

PARTNERSHIP. — ONE OF SEVERAL PARTNERS HAS NO AUTHORITY, without the consent of the other partners, to make a general assignment of the firm property for the benefit of creditors.

PARTNERSHIP. — SOLE SURVIVING PARTNER MAY MAKE GENERAL ASSIGNMENT of the firm property for the benefit of the firm creditors, in the absence of any statute providing for the winding up and settlement of partnership estates.

PARTNERSHIP — SETTLEMENT OF ESTATES OF. — Kansas Compiled Laws of 1885, article 2, chapter 37, make ample provision for the winding up and settlement of partnership estates, either by the surviving partner or by the administrator of the deceased partner's estate, and such provision precludes the doing of it in any other manner.

Don Carlos and Son, for the plaintiff in error.

A. G. and W. H. McBride, for the defendant in error.

CLOGSTON, C. This was an action upon a large number of promissory notes made payable to Pierpont and Tuttle, and guaranteed by the firm of Shattuck and Bowers in these words: "For value received, I hereby guarantee the payment of this note according to the terms thereof, waiving demand, notice, and protest. Shattuck and Bowers." The evidence shows that Pierpont and Tuttle were a manufacturing firm, located at Bushnell, Illinois, and that Shattuck and Bowers resided in Phillips County, Kansas, and were engaged in the sale of agricultural implements. Certain agricultural implements furnished by Pierpont and Tuttle were sold by Shattuck and Bowers, and the notes sued on were taken in payment therefor, said notes being made payable to Pierpont and Tuttle, and before delivery to them were guaranteed as above stated. In answer to the petition, the defendant alleged, among other defenses, that the plaintiff was not the assignee of Pierpont and Tuttle, and that he had no right or authority to bring the action; and also alleged that Pierpont and Tuttle had failed to collect the notes when the same were due and payable; that the makers of the notes were solvent at that time, and afterward became insolvent and non-residents of Kansas.

The plaintiffs offered in evidence the notes sued on, and the deed of assignment made in Illinois by Tuttle in the firm name of Pierpont and Tuttle; also a deed of assignment by Tuttle as the surviving partner of Pierpont and Tuttle. Said last deed of assignment, in addition to a general assignment

of all the property of the firm of Pierpont and Tuttle, ratified the first deed of assignment, and all the doings and proceedings had thereunder by the plaintiff as such assignee. Both of these assignments were objected to, and the objection overruled, and were admitted in evidence. The first deed was objected to upon the ground that one of several partners has no authority, without the consent of the other partners, to make a general assignment of the partnership property. The plaintiff contends that the deed of assignment is *prima facie* good, and it devolved upon the defendant to show that Pierpont did not consent to the assignment, and that unless it was at least shown that he objected to the assignment, the assignment must be held good. In this we do not agree with the plaintiff. Where an assignment is made by one partner, his right to make that assignment depends upon the consent of his co-partner; and to give him authority to make it, he must, in addition, show that his partner consented thereto, or show such a state of facts from which the court could presume assent, or show that the partner was absent from the country, and that therefore his assent could not be procured, or some other state of facts that would show to the court that the partner making the assignment had authority, either by reason of the articles of partnership, or by the fact that his being managing agent of the partnership, or some such fact from which the court could say that the assignment was authorized by the partnership. No such proof was made in this case, and we think, in the absence of such proof, the assignment offered in evidence was absolutely void: See Burrill on Assignments, 5th ed., secs. 68-88; *Loeb v. Pierpont and Tuttle*, 58 Iowa, 469; 42 Am. Rep. 122; *Lowenstein v. Flauraud*, 82 N. Y. 494; *Haggerty v. Granger*, 15 How. Pr. 243; *Dunklin v. Kimball*, 50 Ala. 251; *Sloan v. Moore*, 37 Pa. St. 217; *Graves v. Hall*, 32 Tex. 665; Story on Partnerships, sec. 101; Parsons on Partnerships, 166. This doctrine is now almost universally acknowledged to be the rule.

The second assignment offered in evidence presents a more difficult question. In many of the states the doctrine is held that a surviving partner cannot make a general assignment, and in these states, the theory upon which the decisions were rendered is, that at the death of one partner, the surviving partner becomes trustee of the partnership estate, and that he has no power to transfer the trust so created to another trustee. This seems to be the doctrine held in New York: *Nelson v.*

Sutherland, 43 N. Y. Sup. Ct. 327; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Cushman v. Addison*, 52 Id. 628; also *Tiemann v. Molliter*, 71 Mo. 512; *Vosper v. Kramer*, 31 N. J. Eq. 420.

On the other hand, it has been held by some of the states that the surviving partner may make a general assignment of a partnership; and to this effect are numerous decisions, among which is *Emerson v. Senter*, 118 U. S. 3, in which case the court held that the surviving partner could make a general assignment. The court said: "The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay." This seems to be the settled doctrine of the supreme court of the United States, and should be followed unless there is some statute making a different rule. This assignment was made under the laws of Illinois, and should be interpreted thereunder; but in this case no statute of Illinois was offered disclosing what provisions had been made in that state by statute for the winding up of partnership business; and in the absence of any showing of this kind, we must presume that the statute of Illinois is like that of Kansas. This brings up the question, Is there any statute in Kansas that conflicts with the rule laid down by the supreme court of the United States in the last case cited? Article 2, chapter 37, of the Compiled Laws of 1885, provides for the winding up and settlement of partnership estates. This provides for the appraisement of partnership property, and that the property shall remain in the possession of the surviving partner, and if he sees fit to continue its management, and the disposing of the partnership assets and the payment of the partnership debts, he may do so upon condition that he give a bond for the faithful performance of the duties imposed; and the power is given the probate court to cite him, after the giving of such bond, to an accounting, and to adjudicate upon such accounts, as in the case of an ordinary administrator, and for an action upon the bond in case of his failure to faithfully administer the partnership estate; and upon his refusal to give the bond and take charge of the partnership property, it becomes the duty of the administrator of the deceased partner's estate to assume the management of the same and to settle it up. By this statute ample provisions are made for the closing up of a partnership estate, either by the surviving partner, or by the administrator of the deceased partner's estate. We think that the legislature by this provision intended

to provide a trustee to close up the partnership upon the death of a member of the firm, and that the statute creates a trust in the surviving partner which he has no power to transfer to another except as it is transferred by his refusal to administer upon the partnership estate, in which event it is transferred by operation of law to the administrator of the deceased partner's estate.

It was said in *Carr v. Catlin*, 13 Kan. 393, in speaking of this class of administrators: "He is neither more nor less than a special trustee as to this property and this class of debts." The rule is, that where a form of procedure is provided by statute, and the manner of doing a particular act or thing is pointed out, it precludes the doing of it in any other manner or form. If the surviving partner under our statutes may transfer his trust to an assignee, then the assignee would close up the entire partnership business in the court having jurisdiction of the assignment and estate thereunder, and would be entirely free from the jurisdiction of the probate court, and the statute above cited would be without any force or effect. Did the legislature intend that this statute might be regarded, or not, at the pleasure of the surviving partner? We think not. This means of winding up a partnership business has been prescribed by the legislature, and in the absence of any proof of the statutes of Illinois to the contrary, we must presume that this is the manner of closing up partnership estates in that state. We therefore think the court erred in permitting the second assignment to be given in evidence, as it gave the plaintiff no authority or right to commence the action.

As this case goes back for a new trial, it may be proper to say that we think the notes sued on in this action being guaranteed by the defendant made him jointly liable with the makers of the notes upon default of payment, and he could be sued with the makers or without them. His liability is just the same as if he had indorsed the notes in blank, waiving demand, notice, and protest; and no default of the payees or holders of the notes in not bringing an action to collect the same could excuse the guarantors from payment. If they had desired to protect themselves, they could have paid the notes, and then had their remedy against the makers, and thereby secured themselves against loss.

It is therefore recommended that the judgment of the court below be reversed, and the cause remanded for a new trial.

It is so ordered.

PARTNERSHIP. — One partner has no implied authority to make an assignment for the benefit of creditors of the partnership property, and such an assignment would be void, unless the other partners are incapable of assenting, either by absence or otherwise: *Loeb v. Pierpont*, 58 Iowa, 469; 43 Am. Rep. 122; and *Anderson v. Tompkins*, 1 Brock. 456, therein cited and quoted. So when one partner absconds, and leaves the partnership insolvent, the other may then make a valid assignment of the partnership property for the firm creditors: *Sullivan v. Smith*, 15 Neb. 476; 48 Am. Rep. 354. One joint debtor cannot execute an assignment of joint property so as to pass title to the assignee: *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

AREY v. HALL.

[81 MAINE, 17.]

PRINCIPAL AND AGENT. — SHIP'S HUSBAND HAS NO RIGHT TO BORROW MONEY on the vessel's account, unless expressly authorized by her owners, and in the absence of such authority, they cannot be held liable for money so borrowed by him.

PRINCIPAL AND AGENT — RATIFICATION OF UNAUTHORIZED ACT. — Where a ship's husband has borrowed money on the vessel's account without the authority of the owners, the latter cannot be held to have impliedly ratified such act merely because the borrowed money has been expended in making repairs upon the vessel.

SHIPPING — REMEDY OF CO-OWNERS OF VESSELS FOR CONTRIBUTIONS FOR ADVANCES. — One co-owner of a vessel cannot maintain an action at law against the other owners jointly to recover for contributions for advances. The joint remedy exists only in equity, and an assignee of such owner has no greater right than his assignor.

ASSUMPSIT by Charles A. Arey, assignee of Amos S. Arey, against S. P. Hall and the other owners of the schooner J. G. Stover.

Wiswell, King, and Peters, for the plaintiff.

Charles P. Stetson and O. F. Fellows, for the defendants.

PETERS, C. J. The claim here in suit is for money had and received by the defendants of a person who sues in the name of an assignee. It will be convenient to speak of such person as the plaintiff.

He and the numerous defendants were, in 1885, owners as tenants in common of a schooner which hailed from Bucks-

port, where the owners resided. One of the owners, S. P. Hall, was ship's husband. In May of that year the vessel went ashore on Nantucket, and bills were incurred for her preservation and repair. Hall, then in good financial credit, without the knowledge or authority of his associates, procured from the plaintiff, at the plaintiff's suggestion, seven hundred dollars with which to pay the bills on the vessel, giving his own note therefor, reading as follows:—

“\$700.

BUCKSPORT, May 28, 1885.

“Borrowed and received of A. S. Arey seven hundred dollars to pay bills on the schooner J. G. Stover, it being for wreckers and repairs bills, payable on demand, and interest.

“S. P. HALL,

“Agent for schooner J. G. Stover and owners.”

Hall placed the money in bank to his private credit with one or two hundred dollars of other money, and paid the bills by drawing checks on the bank account for their respective amounts. He did not at the time place the borrowed funds to the credit of the owners, nor render it to them in any account until after his insolvency and failure occurred, two years afterwards. Hall owed the owners three hundred dollars for the vessel's earnings when he borrowed of plaintiff, and thirteen hundred dollars when he failed, exclusive of the borrowed money. The plaintiff made no demand for his money, not needing it for his own use, until this suit was instituted.

The plaintiff endeavors (in the name of the assignee) to maintain the action by proving that the money he loaned to Hall was actually expended to pay the bills against the vessel.

It is not pretended that Hall was authorized to borrow the money on the personal credit of the owners. Clearly, he was not. If he could borrow money for one purpose, he might use it for another purpose, and therefore the law does not invest a ship's husband with such authority. Of course he might be expressly authorized by the owners to borrow. He may contract bills against the vessel, though he may not borrow money on the vessel's account to pay them: 3 Kent's Com. 187; Story on Agency, 9th ed., sec. 35, and note; 1 Bell's Com., 5th ed., 504.

The plaintiff, however, contends that he is entitled to recover upon another ground, which is, that the owners have

enjoyed the benefit of the money in the payment of their debts, and cannot retain that benefit without rendering to the plaintiff compensation therefor. It is contended that the defendants, by refusing restitution, have ratified the act of their agent. It is not difficult to see that such a sweeping proposition would almost entirely subvert the principles of agency before mentioned. It makes the principal liable in all cases for unauthorized borrowings by his agent, provided the agent expends the money in the management of the principal's business, regardless of the existence of any equities or necessities which should exonerate the principal from making restitution.

It is well settled, as a general rule, that a person who has received the benefit of the money or property of another is not liable to such person therefor, in the absence of contract between the parties, if there be any ground upon which the money or property, or its benefit, may be rightfully retained by its possessor without accounting to the owner. Ratification of another's act does not result in such case. It is the wrongful keeping of another's property which creates liability to him.

There are several reasons why this rule is applicable to the facts of the present case.

In the first place, it is at least doubtful if, in a legal sense, it was plaintiff's money that went to the benefit of the defendants. It was legally loaned to Hall. Hall was, and still is, liable on the note. As one of the owners he surely does not wrongfully retain the money. He merely neglects to pay his note. There is a difference between money which has no ear-mark, and other property: *Dwinel v. Sawyer*, 53 Me. 24; *Thatcher v. Pray*, 113 Mass. 291.

It was held in *White v. Sanders*, 32 Me. 188, that if one wrongfully sell the plaintiff's goods, the receipt of money from him by the plaintiff on account of the goods would not be a ratification of the sale, provided the plaintiff would have a right, without ratifying the sale, to keep the money. *Hastings v. Bangor House Proprietors*, 18 Id. 436, is a marked illustration of the same principle.

One reason why the defendants are not wrongfully withholding the borrowed money is, that they are unable to restore it. It has gone into the vessel without the defendants knowing they were receiving the plaintiff's money. It was held in *Davis v. School District*, 24 Me. 349, that a school district cannot be considered as promising to pay for unauthorized repairs

on their school-house by using it afterwards. They could restore what they had received only by an abandonment of their property, and that they were not obliged to do: *School District v. Aetna Ins. Co.*, 62 Me. 330.

Further, the defendants' condition has become changed, without notice of the plaintiff's claim. Instead of being indebted to the ship's husband, he has become a debtor to them in a larger sum than the plaintiff's claim, and is insolvent. The plaintiff has slept on his claim: *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96.

The town cases, relied on by the plaintiff, properly understood, are not inconsistent with these views, and do not support the plaintiff's contention. In the first of them the doctrine was rather too broadly stated (72 Me. 522), and in *Lincoln v. Stockton*, 75 Id. 141, some qualification of the doctrine of previous cases was intended; and in *Otis v. Stockton*, 76 Id. 506, the doctrine is enunciated more satisfactorily.

Another difficulty which is in the way of a recovery in this action is, that no action at law for contributions for advances by one owner can be maintained against the other owners jointly. A joint remedy must be in equity. And the assignee can have no greater right in this respect than the assignor. An owner cannot enlarge his claim against co-owners by selling it.

Plaintiff nonsuit.

POWER OF MASTER TO PLEDGE SHIP'S CREDIT for borrowed money: *Stearns v. Doe*, 12 Gray, 482; 74 Am. Dec. 608, and note.

LIABILITY OF PART OWNER OF SHIP for repairs made thereon by another part owner: *Elder v. Larrabee*, 45 Me. 590; 71 Am. Dec. 567, and note 722; note to *Donnell v. Walsh*, 88 Am. Dec. 364 et seq.

INHABITANTS OF MONSON v. TRIPP.

[81 MAINE, 24.]

MUNICIPAL CORPORATIONS — AUTHORITY OF TOWN TREASURER TO CONVEY LANDS. — A town treasurer cannot, of his own volition, and without express authority from the town, convey its title to land; and a note given in payment of such unauthorized conveyance is without consideration and void.

MUNICIPAL CORPORATION — AUTHORITY OF TOWN TREASURER TO CONVEY LANDS — ESTOPPEL. — Where a town treasurer has conveyed town land without authority, and accepted a note in payment, the fact that he conveyed other portions of the land to other parties does not constitute an estoppel to setting up the invalidity of the note in an action thereon.

J. F. Sprague, for the plaintiffs.

Henry Hudson, for the defendants.

PETERS, C. J. The defendants are sued upon a note given by them to the town of Monson for a quitclaim deed of a tract of land to which the town claimed title under a tax deed. The title of the town was utterly worthless, and admitted to be so. The proceedings were void by which it was undertaken to create the tax title. It was wild land, and neither the town nor its grantees ever had any possession of it, or derived any rents or profits from it. It is also admitted that the deed to the defendants was made by a town treasurer without any vote of the town authorizing a conveyance, and that the town has never by any vote ratified the treasurer's act.

It is contended that the note is without consideration and not recoverable, for two reasons:—

1. Because the deed failed to convey any title whatever. We do not concur in this view. It is against our own decisions. Had the deed been authorized by the town, the town selling such title as it had or might have, without any misrepresentation or deceit on its part, the contract would have been a legal one: *Emerson v. County of Washington*, 9 Me. 88; *Soper v. Stevens*, 14 Id. 133; *Butman v. Hussey*, 30 Id. 263. Equity will sometimes relieve parties in such transactions, on the ground of mistake, if the mistake be of a character grave enough to justify its interposition.

2. The defendants claim that the note is without consideration and void, because the treasurer possessed no authority to convey the property for the town. On this point, the defense can be sustained. An unauthorized deed is not a deed. If a treasurer can, of his own volition, convey away the doubtful titles of his town, he may convey all its titles and property in the same way. He is not invested with any such privilege, and his act in this instance was unquestionably void.

The plaintiffs contend that the defendants are estopped to set up this point of defense, because of their after conveyances of some portions of the same land to other persons, the defendants obtaining about twenty-five dollars in all from such persons. That was a matter between the defendants and third persons, in no way affecting the town; and the fairness of their after dealings, and the question whether those dealings resulted in losses or profits, we cannot take into considera-

tion. Nor does the bringing of a suit on the note by some town officer, without any vote or instruction from the town, establish any liability upon the defendants: *Bliss v. Clark*, 16 Gray, 60.

Judgment for defendants.

CITY OFFICER CANNOT MAKE CONTRACT regarding land on behalf of the city without express authority: *Providence v. Miller*, 11 R. I. 272; 23 Am. Rep. 453. A town officer never has authority to contract for the town as its agent, except where he is given express authority: *Petersburg v. Mappin*, 14 Ill. 193; 56 Am. Dec. 501; 1 Dillon on Municipal Corporations, secs. 445, 447.

FIELD v. CAPPERS.

[81 MAINE, 86.]

PLEADING AND PRACTICE. — PLEA OF RELEASE PUIS DARREIN CONTINUANCE is defective unless it alleges the time and place when and where the release was made and delivered, and the day of the last continuance, or that there was a continuance.

PLEADING AND PRACTICE — PLEA PUIS DARREIN CONTINUANCE — REPLEADER. — Where plea of release *puis darrein continuance* is held bad on demurrer, a replader on terms may be granted in the discretion of the court.

F. E. Southard, for the plaintiff.

E. W. Whitehouse, for the defendant.

PETERS, C. J. This action of *assumpsit* on an account annexed comes from a municipal court to the Kennebec superior court by appeal. In the appellate court, the defendant pleaded *puis darrein continuance*, a release since the general issue was pleaded in the court below, the plaintiff demurring to such plea.

Great certainty is required in pleas of this description, in both substance and form. It is easy to draught a correct plea of the kind, inasmuch as recourse to the forms which have been universally approved for a century will furnish safe guidance.

The plea here is defective, in that no place is alleged where the release was made or delivered; time and place should be alleged: *Cummings v. Smith*, 50 Me. 568; 79 Am. Dec. 629.

It is defective, in that it does not state the day of the last continuance, or that there ever was a continuance. Such a statement in some form is indispensable under our system composed of common-law forms, whilst it may not be so in

some courts which are constantly open, and do not adjourn from term to term: So held in *City of Augusta v. Moulton*, 75 Me. 551.

The plea is otherwise uncertain, involved, and confused, and vitally defective.

While the demurrer must be adjudged good and the plea bad, it would be in the furtherance of justice to accord to the defendant the right of repleader on payment of costs accruing since the plea was filed; on failure to do which, judgment in the action to go against the defendant. This concession to the defendant is allowable in the discretion of the court. It was so held in the case last cited.

Demurrer sustained. Plea bad. Repleader allowed upon terms.

PLEA PUIS DARREIN CONTINUANCE must have the same certainty as to time and place as other pleas; if it does not allege the day on which the matter pleaded happened, it is bad: *Cummings v. Smith*, 50 Me. 568; 79 Am. Dec. 629, and note 631.

CROSWELL v. LABREE.

[81 MAINE, 44.]

NEGOTIABLE INSTRUMENTS — ALTERATION OF NOTE. — The unauthorized alteration of a note by inserting in it the words "or bearer" after the name of the payee will not avoid it, if done innocently, without fraudulent or improper motive.

NEGOTIABLE INSTRUMENTS — ALTERATION OF NOTE — BURDEN OF PROOF. — The unauthorized alteration of a note by inserting the words "or bearer" after the name of the payee is a material alteration, and the burden of proof is on the holder to show that the alteration was innocently made.

ACTION on a promissory note. Verdict for plaintiff.

Joseph C. Holman, for the plaintiff.

E. O. Greenleaf, for the defendant.

PETERS, C. J. The note in controversy contains the promise of the defendant to pay "to the order of" J. G. Timberlake "or bearer" a sum of money, and was indorsed by the payee to the plaintiff. The defense at the trial was an alleged unauthorized alteration of the note by inserting in it the words "or bearer."

The judge at the trial ruled that if the alteration, though unauthorized, was made innocently, without any fraudulent

or improper motive, it would not avoid the note. That was correct, and is well borne out by the principle established in *Milbery v. Storer*, 75 Me. 69; 46 Am. Rep. 361.

The further instruction was given that the burden of proof was on the defendant (the maker) to satisfy the jury that the note was improperly altered. We are of opinion that this instruction was not correct. The act of alteration was apparently fraudulent. A wrongful act naturally indicates a wrongful intent, and requires explanation to excuse it. The holder of a note must show that an alteration proved or admitted was made innocently. Otherwise it would follow that, in the case of the most glaring forgeries by alteration of negotiable paper, the party sought to be charged thereon must explain the motive of the forger. In the case cited it is declared that alteration is *prima facie* evidence of fraudulent intent, but that it may be rebutted and disproved.

The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence: *Chadwick v. Eastman*, 53 Me. 12; *Hewins v. Cargill*, 67 Id. 554. It was held in *Dodge v. Haskell*, 69 Me. 429, that the burden is on the plaintiff to explain any apparent material alteration of a note, so far as it does not sufficiently explain itself to the minds of a jury.

Exceptions sustained.

UNAUTHORIZED ADDITION OF WORDS "OR BEARER" to note avoids it as to the maker: *McCauley v. Gordon*, 64 Ga. 221; 37 Am. Rep. 68. And as to what is a material alteration and its effect: *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and note 25.

BURDEN OF PROOF IS UPON PARTY producing a note which appears to have been altered in a material part to show the legality of the instrument: *Clark v. Eckstein*, 22 Pa. St. 507; 62 Am. Dec. 307; *Simpson v. Stackhouse*, 9 Pa. St. 186; 49 Am. Dec. 554, and note 557; *Harris v. Bank of Jacksonville*, 22 Fla. 501; 1 Am. St. Rep. 201.

MAINE BENEFIT ASSOCIATION v. PARKS.

[81 MAINE, 79.]

INSURANCE — FALSE REPRESENTATIONS REGARDING HEALTH IN POLICY. —

The insured was confined by childbirth in November, 1887; was sick of typhoid fever in January, 1888, from which she got up some time in March following. She applied for insurance March 1, 1888, was examined by the company April 18, 1888, and her application approved the 22d of the same month. On May 12, 1888, her physician found her weak, coughing, and sick with consumption, which caused her death on July 21, 1888. In her application she stated that she then was in good health, and that she had usually had good health, and in a suit to cancel the policy, the jury found she believed her statements to be true, but this court holds that such finding is not supported by the evidence, and orders the policy annulled.

INSURANCE — WHAT IS GOOD HEALTH. — The health of body required at the time of making application for insurance to make the policy attach is not perfect and absolute health, nor must it exclude all disorders or infirmities which may possibly shorten life. Only an ordinary and reasonable degree of health is required, and this question is generally to be determined by the jury.

George C. and Charles E. Wing, for the complainants.

D. J. McGillicuddy, for the defendant.

PETERS, C. J. The complainants, by this bill, seek to have canceled a life insurance policy, issued by them to Alice J. Parks for the benefit of her husband. It is claimed that the policy was wrongfully obtained, or improvidently issued. She has died since this proceeding was instituted. The policy being for the benefit of the husband, the bill may be continued against him as her survivor.

The ground upon which the bill seeks a cancellation of the policy is, that she falsely stated in her application that she was at that date in good health, and that she had usually had good health. She declares at the close of her application, which is made a part of the policy, that she warrants all her statements in general and particular to be true to her best knowledge and belief, and that any untrue or fraudulent statement or concealment of facts by her shall forfeit and cancel all rights to any benefit under the policy.

The questions of fact, whether she had good health when insured, and whether she usually had good health, were submitted to a jury, which found in her favor. The motion is, by the complainants, not only to set the verdict aside, but that the court, notwithstanding the verdict, shall declare the policy to be void. The judge has reported the evidence on this mo-

tion to the full court, for its decision of the questions presented.

Possibly a question exists as to whether her answers in the application are warranties or representations, and nice distinctions may be found in the decided cases between the two kinds of contract. But that is immaterial here, as in either case the policy should be declared void, if the statements were untrue. It matters not whether they were warranted to be true, or merely represented to be true, if in fact untrue: *Campbell v. Life Ins. Co.*, 98 Mass. 381; 2 Parsons on Contracts, 6th ed., 465, and cases.

The insured was about twenty-four years old, had three children, one about six months old, when her application was made. She was confined by the birth of her infant in November, 1887, and was sick of typhoid fever in January, 1888, from which she got up some time in March afterwards. Her application is dated March 1, 1888; she was examined by the medical agent of the company on April 18th, and her application was approved by the company on April 22d. On May 12, 1888, her physician was called, who found her weak, with a cough, and sick with consumption, from which disease she died on the 21st of July afterwards.

The complainants contend that she was sick of incipient consumption as early as when her application was tendered to the company, and that she never really recovered from the effects of the fever with which she was afflicted at the beginning of the year. These positions are denied by the other side.

The usual question arises as to what is good health, and as we find no statement of the law on the question more satisfactory than that of Professor Parsons, summarized from the authorities, we quote from it as expressive of our views on the subject: "The health of the body required to make the policy attach does not mean perfect and absolute health; for it may be supposed that this is seldom to be found among men. 'We are all born,' said Lord Mansfield, 'with the seeds of mortality in us.' Nor can there be any other definition or rule as to this requirement of good health than that it should mean that which would ordinarily and reasonably be regarded as good health. Nor should we be helped by saying that this good health must exclude all disorders or infirmities which might possibly shorten life; for, as has been well said in an instructive English case, that may be said of every disorder or infirm-

ity. But it must obviously be very difficult to determine questions like these by any general rule. And it is the usual practice of courts to leave these questions to the jury. . . . Courts and juries usually, and we think properly, construe these questions and answers quite liberally in favor of the answerer, and quite strictly against the insurers, unless there be a reasonable suspicion of fraud. The good faith of the answers should be perfect. The presence of it goes very far to protect a policy, while a want of it would be an element of great power in the defense": 2 Parsons on Contracts, 6th ed., 465.

There is obviously a close line between incipient disease, disease in its first stages, and merely a bodily condition which is susceptible to the contraction of disease. A weak person may be well, and a strong person sick. And of course a person may have a disease upon him without knowing it. The complainants contend that, whether the insured knew or appreciated the fact or not, there was an unbroken connection between the fever and the consumption, one running into the other, the effect of which caused death, and that it was impossible that she was in good health when insured. We are so strongly impressed that the jury have committed error in their findings, we think the verdict should be set aside, and the case decided without committing it to a jury again. It would, to our minds, be flagrant injustice to other policy holders, on the facts presented, and evidently no other material facts are attainable, to allow this policy to stand: *Larrabee v. Grant*, 70 Me. 79. We think the bill should be sustained without costs, the policy annulled, and all premiums received be returned.

Decree accordingly.

GOOD HEALTH, WHAT IS. — A statement by a party applying for life insurance that he is in "good health" does not mean that he is in a condition of perfect health. If such were its meaning, there is no policy conditioned upon a statement of good health being given that would be valid, since no one, no matter how robust he may appear, is in perfect health. There is no one in whom there are not some seeds of disease. Evidently the whole structure of life insurance rests on this assumption, since if death was not in all cases a probable contingency, life insurance would not, and could not, exist. Thus, in an early case, the policy contained a warranty that the insured was in good health when the policy was executed. On the trial, it was shown that the insured was troubled with spasms and cramps, from violent fits of gout, but was in as good health when the policy was executed as he had been for a long time before. It was also shown that the spasms and convulsions

were symptoms incident to gout. Lord Mansfield instructed the jury that "by the present policy, the life is warranted to some underwriters 'in health,' to others 'in good health,' and yet there is no difference in point of fact. Such a warranty can never mean that a man has not the seeds of disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." A verdict was rendered for plaintiff: *Willis v. Poole*, Park on Insurance, 2d Am. ed., 440; Bliss on Life Insurance, 2d ed., 145. So, in another case, the same learned judge said that a warranty of good health meant simply that the applicant was in a reasonably good state of health, and was such a life as ought to be insured on common terms; that it did not mean that he was free from every infirmity, and in fact, though he had one, the life still might be a good one; and the fact that the insured had, several years before, received a wound in the loins, which so affected him that he could not retain his urine or *feces*, though not mentioned in the policy, was not inconsistent with a good insurable life: *Ross v. Bradshaw*, 1 W. Black. 312. And again, in *Watson v. Mainwaring*, 4 Taunt. 763, under a policy containing a warranty of good health, with undisclosed dyspepsia as ground of avoidance, Chambre, J., said: "All disorders have more or less a tendency to shorten life, even the most trifling; as, for instance, corns may end in mortification. That is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life within this exception (good health), the lives of half of the members of the profession of the law would be uninsurable." So a declaration of good health means simply that the declarant is and has been, according to his knowledge and belief, free from any disease, or symptom of disease, material to the risk, and does not import a declaration against any latent, imperceptible disease that could be discovered only by *post-mortem* examination, or from symptoms disclosing themselves at an after period of time: *Hutchinson v. National Life Assurance Soc.*, 7 Sess. Cas., 2d ser., 467; 3 Bigelow on Life and Accident Insurance, 444. Again, such a warranty is not vitiated by non-communication by the insured that a few years before he was afflicted with a disorder tending to shorten life, if it appears that the disorder was of such character as to prevent the insured from being conscious of what happened to him while suffering under it: *Swete v. Fairlie*, 6 Car. & P. 1; 2 Bigelow on Life and Accident Insurance, 244.

In *Peacock v. New York Life Ins. Co.*, 1 Bosw. 338, affirmed in 20 N. Y. 293, the court, in defining the warranty of good health, said: "The word 'health,' as ordinarily used, is a relative term. It has reference to the condition of the body. Thus it is frequently characterized as perfect, good, indifferent, or bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill which 'flesh is heir to.' If the phrase should be so interpreted as to require entire exemption from physical ills, the number to whom it would be strictly applicable would be very inconsiderable. In applying terms somewhat indefinite, reference should be had to the business to which they relate. This rule is very necessary when construing a language which, like ours, is defective in expression. The most important question on applications for insurance is, whether the proponent is exempt from any dangerous disease, one which frequently terminates fatally. It is not usually deemed an objection that one has some slight physical disturbances of which, in all human probabilities, he will soon be relieved,

although it might possibly lead to a fatal disease. A slight difficulty, such as the sting of a bee, the puncture of a thorn, a boil, or a common cold, has sometimes induced complaints which have shortened human life; but this result is so infrequent and improbable that the mere possibility is disregarded in the business of life insurance. Now, in the case under consideration, the assured, while admitting that he had been afflicted with dyspepsia, with piles, and occasionally with bleeding piles, palpitation of the heart, and nervousness, and had then a temporary cold, asserted, nevertheless, that he was then in good health." The company accepted the policy with knowledge of these facts, and was held liable. Again, in *Morrison v. Wisconsin etc. Life Ins. Co.*, 59 Wis. 162, it is said that the term "sound health," as used in contracts of assurance, does not import absolute freedom from bodily infirmity or tendency to disease. Thus "a touch of dyspepsia coming on," which manifests itself only at long intervals, which yields readily to medical treatment, and which is not shown to have been organic or excessive, is not inconsistent with a representation that the person so affected is in sound health; and again, the court, in speaking of a warranty of this kind, said that in construing a policy of life insurance, it must be generally true that before any temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health and the continuance of life, or such as, according to the common understanding, would be called disease: *Cushman v. United States Life Ins. Co.*, 70 N. Y. 77; and to the same effect, *Illinois etc. Society v. Winthrop*, 85 Ill. 537. Thus the mere fact that the assured, shortly after the policy was given, was stricken with the disease which ultimately caused his death, does not disprove the fact that he was in good health at and previous to the time that the policy was effected: *Electric Life Ins. Co. v. Fahrenkrug*, 68 Id. 463.

The term "good health," as used by an applicant for life insurance, means, says Dyer, J., in *Goucher v. Northwestern etc. Ass'n*, 20 Fed. Rep. 698 (construing the Civil Code of Wisconsin), "that the applicant is free from any apparent sensible disease or symptoms of disease, and that he is unconscious of any derangement of the functions by which health can be tested. The term as here used does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. Slight, infrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health, as that term is here employed." And see also *Conver v. Phoenix etc. Life Ins. Co.*, 3 Dill. 224. In *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, the court held that an instruction in the following language was proper: "That the 'sound health' mentioned at the time the application was made meant a state of health free from any disease or ailment that affects the general soundness or healthfulness of the system seriously, not mere temporary indisposition not tending to weaken or undermine the constitution of the insured." In this case, the assured died from stoppage of the menses subsequent to the insurance. In the case of *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372, this question was directly before the court, and thoroughly considered. The conclusion there reached is, that the warranty of good health occurring in the description of an applicant for life insurance denotes nothing more than an absence of any known, ostensible, or felt symptoms of disorder; that such a warranty that a third person is in good health does not mean an actual freedom from disease, but simply that such person has indicated in his ap-

pearance and actions no symptoms or traces of permanent disorder or disease, and to the ordinary observation of a friend or relative is in truth well. Therefore if, from the appearance of the insured, he was in good health so that anybody would so pronounce him, and there was nothing to indicate the contrary, the warranty was not broken, though in fact the germs of a hidden and lurking disease then existed.

GILPATRICK v. GLIDDEN.

[81 MAINE, 137.]

WILLS — COMPULSION OF DEVISEE TO PERFORM PROMISE. — Where a husband expressed to his wife his intention of devising all his property to his own heirs, but was induced by her to sell and will it to her, in form absolute, upon her assurances that she would use it during her natural life, and at her death would devise it to his heirs, upon the failure or refusal of the devisee to perform her agreement after the death of the testator, equity will decree a trust in favor of such heirs, and convert the devisee into a trustee for their benefit.

Baker and Baker, and Cornish, for the complainants.

Spear and Clason, and Loring Farr, for the defendants.

VIRGIN, J. The plaintiffs are the nephews and neice and next of kin of the late Orrin Gilpatrick, and the defendants are the administrator and next of kin of the widow of Orrin, neither of whom left any children.

The plaintiffs seek to establish their title to the proceeds of certain real and personal estate, on the ground that Orrin, having expressed to his wife his intention of leaving all his property to his heirs (plaintiffs), was induced by her to sell and will it to her, in form absolute, in sole consequence of his reliance upon her assurance that she would use it during her natural life only, and seasonably transfer the remainder to his own heirs; that she did not fulfill her agreement, but died intestate, whereupon the property descended to her heirs instead of his; and that, by reason of the premises, it became vested in her in trust, — to enforce which trust is the object of this bill.

The presiding justice, who saw and heard all of the witnesses testify, found the facts in favor of the plaintiffs, which finding we should be slow to reverse unless clearly satisfied that it was erroneous: *Young v. Witham*, 75 Me. 536. But after a very careful examination of the stenographer's report of the direct and uncontradicted testimony of the Gilpatricks' life-long, trusted friend and his wife and daughter, in whose

family Mrs. G. lived during four years of her widowhood; of their family physician of many years, their business adviser, scrivener, and executor of Mr. G.'s will, and the writer, at her dictation, of what Mrs. G. called a "certification"; of the neighbor who purchased the hay during the last ten years of Mr. G.'s life, and of her thereafter,—all disinterested witnesses,—whose testimony of Mr. G.'s frequent expressions to his wife, for months before his decease, of his desire and intention that his property should go to his own heirs; of her final agreement to transfer the remainder thereof "after she was done with it," provided he would give it to her absolutely; of her frequent and freely expressed admissions of such agreement, and of her own construction of it as evidenced by her own acts in executing all the stipulations thereof, except the final transfer of the remainder of the property to his heirs, and putting even that in writing, signed by her; and of the peculiar instructions of Mr. G. as to the phraseology of the will,—not to use the word "give,"—we are fully satisfied that the justice's finding of facts was correct, and that the following, among other facts, are clearly established:—

That Orrin Gilpatrick died in February, 1875, possessed of a farm which came down to him from his paternal grandfather, and of other property, all of the value of more than nine thousand dollars, and which he desired to go to his heirs; that his widow died in 1883, leaving property which she had owned in her own right, consisting chiefly of money invested in town securities, amounting to some five thousand dollars; that they left no children, but a widow of a deceased son; that they always kept their individual property separate; that for several months before his decease they had frequently discussed the mode of the disposition of his property, and as she had so much in her own right, he frequently expressed to her his intention of giving his to his own heirs; that a short time before his death she finally induced him to give some of the personal property and will the remainder of his estate to her in form absolute, upon her assurance that she would only use it, if necessary, during her natural life, pay their daughter-in-law five hundred dollars, reconvey certain real estate, the legal title of which he held, to one Glidden, erect a monument in and keep in repair their private cemetery, and finally seasonably transfer all that remained to his heirs; that if she had not given her husband such assurance, and if he had not

confidently relied upon her performance of it, he would not have executed the will nor given her the personal property; that she promptly performed all of the terms of her agreement except the final transfer of the remainder, which she purposely omitted to do, although she had expended but a comparatively small portion of the property during her life.

Nor do we entertain any doubt of the soundness of the law on which the decree appealed from was based, viz.: a constructive trust impressed upon the property and the donee and devisee converted into a trustee *in invitum*, although not so denominated in the paper title, and although the statute expressly provides: "There can be no trust concerning lands unless created or declared by some writing signed by the party or his attorney": R. S., c. 73, sec. 11.

Fraud is infinite in its varieties and forms; and while, as Lord Hardwicke said, "the court very wisely hath never laid down any general rule beyond which it would not go lest other means of avoiding the equity of the court should be found out" (*Lawley v. Hooper*, 3 Atk. 278), still rules have been established governing certain classes of cases involving the element of fraud,—such as that the fraudulent suppression of a cause of action or of a will is a good answer to the statute of limitations: *Deake, Appellant*, 80 Me. 50; that married women and infants shall not take advantage of rules made for their protection to perpetrate fraud: *Perry on Trusts*, sec. 170; and that the statute of frauds shall not be allowed to bar a decree for the specific performance of an oral agreement for the sale and conveyance of land when there has been such a part performance by the party seeking as equity as equity recognizes: *Pulsifer v. Waterman*, 73 Me. 233; *Woodbury v. Gardner*, 77 Id. 68. And while the precise question involved in the case at bar has never before arisen in this state, the cases last cited are analogous thereto in principle; and the universally recognized ground on which the decisions rest is, that to permit the statute of frauds to be used as a bar to the compulsory performance of such an agreement thus partly performed would practically authorize a statute enacted for the purpose of preventing a fraud to become the veriest instrument for perpetrating or protecting a fraud.

So, for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his own benefit, while in fact another is entitled to it, or

to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title, but by imposing on him the duty of holding and using his title for the real beneficiary.

Applying the principle to the facts in this case, Mr. G. was persuaded by his wife to change his intention of leaving his property to his own heirs, and to give it to her by reason of her express promise to give the remainder to his heirs, which she omitted to do. His will was regularly probated, and the legal title passed thereby to her. His heirs claim that remainder because her conduct operated as a fraud upon her husband as well as upon them, and that by reason thereof she held the property impressed with a trust and she made a trustee. Equity does not interfere with the will; that remains unchallenged. Nor does it assume to set aside the statute of frauds which the defendants invoke. But, on account of her conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit, and imposes on her conscience the obligation to hold all she did not use during her life for the benefit of her husband's heirs (plaintiffs) as the equitable owners thereof, and the additional obligation of perfecting their ownership by will or otherwise. But as she has deceased, equity can reach the personal, or the proceeds of both real and personal, in the hands of her personal representatives and any of the real estate in the hands of any subsequent holder who is not a *bona fide* purchaser thereof, without notice holding it relieved of the trust: Pomeroy's Eq. Jur., secs. 431, 1053.

We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor; for the great current of English authority during the last two centuries, as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect; and the latter by any words or acts calculated to, and which he knows do in fact, cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement,—equity will decree a trust and convert the devisee into a trustee, whether, when he gave

his assent, he intended a fraud or not,—the final refusal having the effect of consummating the fraud.

As this is the first case of this kind that has ever arisen in this state, and we have the English and American cases before us, we mention some of them.

Thus as early as 1678, where a father, being about to change his will lest there might not be assets enough besides the lands settled on his son to pay certain legacies to his daughter, was assured by the son that he would pay them in case of deficiency of assets if the will were not changed, the son was held to his promise,—the chancellor remarking that it was the constant practice of the court to make such decrees on such promises: *Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Abr. Cas. Eq. 43.

So in 1684, where her son promised the executrix that if she would obtain a new will naming him as executor he would hold it in trust for her,—which she did,—the lord-keeper decreed the trust notwithstanding the statute of frauds: *Thynn v. Thynn*, 1 Vern. 296.

So in 1689, where a copy-holder, intending to leave the greater part of his estate to his godson, was persuaded by his wife, on her promise to carry out his intentions, to give the whole to her, the court, notwithstanding the statute, enforced the trust: *Devenish v. Baines*, Ch. Prec. 3.

In *Oldham v. Litchfield*, 2 Vern. 506, 2 Abr. Cas. Eq. 44 (1705), lands were charged with an annuity, on proof that the testator was prevented from changing them in his will by a promise of payment by the devisee.

Again, in 1747, a testatrix having given a bond for £360 to the plaintiff, afterwards by a new will gave it to another on the latter's promise to give it, at her own decease, to the plaintiff, and the performance of the promise was decreed against her representatives, against the interposition of the statute of frauds, Lord Chancellor Hardwicke said: "I know of no case where the court has not decreed it, whether such an undertaking was before the will or after. . . . This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect. A will being ambulatory, if the testatrix has a conversation with a legatee who promises that in consideration of the testator's disposition in her favor she will do an act in favor of a third person, the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform; because I must

take it if she had not so promised, the testator would have altered the will": *Drakeford v. Wilks*, 3 Atk. 539.

The next year, a residuary legatee, who satisfied the testator that he need not change his will in order to give a nephew one hundred pounds, for he himself would pay it, was held trustee, and a trust imposed on the residue of the assets. Lord Chancellor Hardwicke, said: "The court will not suffer the statute to protect fraud so as that any one should run away with a benefit not intended. . . . There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will": *Reech v. Kennegal*, 1 Ves. Sen. 123; *Amb.* 67; 1 Wils. 227.

So in 1796, instead of changing his will with the avowed intention of increasing the annuity to his wife, the testator told his residuary legatee he would "leave it to his generosity to pay it as he promised,"—and a trust was imposed on the residue of the assets. The master of the rolls said: "The word 'generosity' cannot be construed to take away the effect of a solemn desire of the testator coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. Leaving it to his 'generosity' is leaving it to his honor and conscience. . . . The question is, whether, by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him that if he did not make a new will he would not do it. Instead of that, he promised to do it, upon which the testator refused to make a new will": *Barrow v. Greenough*, 3 Ves. 152.

In 1804, Lord Eldon said: "If a father devises to his youngest son, who promises that if the estate is devised to him he will pay ten thousand pounds to the eldest son, this court would compel the former to discover whether that passed by parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of ten thousand pounds": *Strickland v. Aldridge*, 9 Ves. 516.

And the like result is brought about by the silent assent of the devisee to a like proposal of the testator: *Byrn v. Godfrey*, 4 Ves. 6, 10; *Paine v. Hall*, 18 Ves. 475.

In 1836, natural children of the testator alleged in substance in their bill that the testator's wife promised, in consideration of his giving to her the whole estate, to leave it to

them at her decease, upon the faith of which he did it. Shadwell, V. C., said: "My opinion is, that if it were perfectly clear that the state of circumstances took place which the plaintiffs allege, they would be entitled to the relief they ask": *Podmore v. Gunning*, 7 Sim. 644, 654.

In 1852, a residuary estate was devised with an oral intimation by the testator to the devisee that he had confidence that he would carry out the testator's intentions, which devisee well knew and assented to,—and the devisee was held a trustee. Lord Justice Turner, V. C., in discussing the question of the devisee's undertaking, said: "The true test of the answer to this question is this: Would the testator have left the property to the defendant if he had stated, in answer to that question, that he would not carry out the disposition which the testator intended to effect through the medium of the trust? No one can doubt that if the defendant had stated that he would not carry out such intentions, the disposition in his favor would not have been found in the will": *Russell v. Jackson*, 10 Hare, 204, 211.

In the often-cited case of *Wallgrave v. Tebbs*, 2 Kay & J. 321, the joint devisees of real estate denied that they ever knew anything of the testator's intentions till after his decease; but an unsigned letter written by him expressed his confidence in their application of the devised property, in accordance with his desires; Wood, V. C. (then Lord Hatherly), upheld the trust, saying: "Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a case of trust; and in such case, the court will not allow the devisee to set up the statute of frauds, or rather the statute of wills, by which the statute of frauds is now, in this respect, superseded; and for this reason, the devisee, by his conduct, has induced the testator to leave him the property; and, as Lord Justice Turner says, in *Russell v. Jackson*, *supra*, no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute; but for the same end—namely, the prevention of fraud—it ingrafts the trust on the devise in order to prevent a party from applying

property to a purpose foreign to that for which he undertook to hold it."

In 1867, in *Jones v. Badley*, L. R. 3 Eq. 635, 652, Lord Romilly, M. R., quoted the foregoing extract entire, and declared the law to be therein very "accurately and very comprehensively stated." On the appeal, in 1868, Lord Cairns quoted the same extract, and pronounced it "the clear and felicitous exposition of the law": *Jones v. Badley*, L. R. 3 Ch. App. 362.

And in 1878, in *Rowbotham v. Dunnett*, L. R. 8 Ch. Div. 430, 436, Malins, V. C., made the same quotation, and pronounced the law "correctly laid down," but dismissed the bill for want of proof.

In 1869, in *McCormick v. Grogan*, L. R. 4 H. L. 82, where, under the peculiar circumstances of the case, no trust was decreed, some of the language of Lord Westbury in the fore part of his opinion, where he says the court "must see that personal fraud—a *malis animus*—is proved, etc., has sometimes been urged by defendants as requiring more than the authorities already cited; but when it is considered in connection with the facts before him, and with his own illustrations in the same opinion, that erroneous view vanishes. After discussing the *rationale* of the principle of dealing with the statute of frauds and of wills, he said: "If an individual on his death-bed, or at any other time, is persuaded by his heir at law or his next of kin to abstain from making a will; or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to him that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to it, either expressly or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request,—then, undoubtedly, the heir at law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud."

Such, in 1873, was the view of Sir James Bacon, V. C., in *Norris v. Frazer*, L. R. 15 Eq. 318, 330, where a husband and wife were devisees of the bulk of the property of a testator who expressed a desire that an annuity of three hundred pounds should be provided for a third person, which the wife testified

she promised, and the husband assented to. The vice-chancellor said: "Mr. Swanston has read particularly from Lord Westbury's judgment in *McCormick v. Grogan*, the condition as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud. . . . If the statement made by Mrs. Frazer (one of the devisees) be true, then a more direct, a more distinct, personal, fraud could not be committed than for Mrs. F. to refuse to perform that promise which she made to the testator on his death-bed."

To the same general purport are *Riordan v. Banon*, 10 Ir. Eq. 645, and *Fleetwood's Case*, L. R. 15 Ch. Div. 594, 606 (decided in 1880). In the latter case, Hall, V. C., after reviewing numerous cases, said: "The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise."

Once more in the English courts, in 1884, in *Boye's Case*, L. R. 26 Ch. Div. 531, 535, in speaking of this class of cases, Kay, J., said: "In these cases, the court has compelled discovery and performance of the promise, treating it as a trust binding on the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is presumed that if it had not been for such promise, the testator would not have made, or would have revoked, the gift"; citing cases *supra*.

This general doctrine, so long and so thoroughly established in England, has been adopted in several of the states, and fully recognized in others.

Thus in 1803, a father was induced to make no will, and let his Maryland property descend to his eldest son, on the latter's promise to convey the same to his younger brother, provided, as was expected, he himself succeeded to certain property in Scotland, which he did subsequently inherit; and the court enforced the promise: *Browne v. Browne*, 1 Har. & J. 430.

In *Owing's Case*, 1 Bland, 370, 17 Am. Dec. 311, 317, 338, after stating the English doctrine of enforcing oral promises of devisees, Bland, C., said, if in such cases the person beneficially interested "could not have the promise enforced, his loss would be irretrievable. He making the promise would be suffered to frustrate the intention of the deceased, to practice a fraud with perfect impunity; and the statute of frauds,

if allowed to apply, would be made to operate for the protection, instead of the prevention, of fraud."

In Pennsylvania, in 1832, the testator's brother was made his residuary devisee on his promise to apply the property for the benefit of the testator's illegitimate son, and a trust was decreed. Gibson, C. J., said: "Equity turns the fraudulent procurer of the legal title into a trustee to get at him. . . . A mere refusal to perform the trust is undoubtedly not enough. . . . It seems to be requisite that there should appear to have been an agency, active or passive, in procuring the devise"; and after citing several of the English cases, said: "If the testator was induced by the promise of his brother, much more if by his suggestion, to believe that a devise to him was the most prudent plan of securing the estate to his illegitimate son, it cannot be said that a breach of confidence thus reposed in him was intended to be protected by this statute": *Hoge v. Hoge*, 1 Watts, 163, 215, 216; 26 Am. Dec. 52. To the same purport are *Jones v. McKee*, 3 Pa. St. 496; 45 Am. Dec. 661; 6 Pa. St. 425; *Church v. Ruland*, 64 Id. 432; *Schultz's Appeal*, 80 Id. 396.

The English rules have also been adopted and enforced or fully recognized in the following cases: *Williams v. Fitch*, 18 N. Y. 546; *O'Hara v. Dudley*, 95 Id. 403; 47 Am. Rep. 53 (a full discussion of the whole subject); *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Glass v. Hulbert*, 102 Mass. 24, 39, 40; 3 Am. Rep. 418; *Campbell v. Brown*, 129 Id. 23, 26; *Olliffe v. Wells*, 130 Id. 211, 224.

The plaintiffs are the nephews and niece of Orrin Gilpatrick, children of his two deceased sisters, Thomas Gilpatrick being the only child of one of the sisters, and the other plaintiffs children of the other. If the property should go to them according to the law of descent, Thomas would be entitled to one half "by right of representation," and the other half to the other plaintiffs equally: R. S., c. 75, sec. 1. Mr. G. invariably spoke of its going to his heirs generally. Mrs. G.'s certificate expressed her desire that "it should be equally divided between his heirs," which, having been written soon after her husband's decease, may be considered as probably expressing the real understanding between her and her husband. Such a division would also seem equitable.

We are of opinion, therefore, that the bill be sustained, and that the plaintiffs have judgment against the goods and estate of Sarah Gilpatrick in the hands of the administrator on her estate for the sum of \$9,508.06, less the sums paid to Zubra

Gilpatrick, the amount paid for erecting the monument and caring for the cemetery, and the commissions paid to the executor, — which amount, if not agreed upon by the parties, to be ascertained by a master.

Decree accordingly.

TRUST IN ABSOLUTE DEVISE may be established by parol proof of contemporaneous declarations of the testator and subsequent declarations of the devisee in possession, that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold it in trust: *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52, note 60; *Jones v. McKee*, 3 Pa. St. 496; 45 Am. Dec. 661; *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53. Words expressive of a wish or desire in a will, if so definite as to amount and subject-matter as to be capable of execution by the court, may, and will when such appears to have been the intention of the testator, create a trust: *Phillips v. Phillips*, 112 N. Y. 197.

DREW v. HAGERTY.

[81 MAINE, 281.]

GIFT CAUSA MORTIS of a savings-bank book from husband to wife to be valid must be accompanied by an actual delivery of the book from the donor to the donee, and such delivery must be made for the express purpose of consummating the gift. A previous and continuing possession by the donee is not sufficient.

GIFT CAUSA MORTIS. — Actual delivery is essential to distinguish a gift *causa mortis* from a legacy, and without which such gift can only be sustained as a nuncupative will.

Newell and Judkins, for the plaintiff.

Frank L. Noble, for the defendant.

WALTON, J. The most important question is, whether the gift of a savings-bank book from husband to wife *causa mortis* is valid without delivery, provided the book is at the time of the alleged gift already in the possession of the wife. The action was tried before the chief justice, and he ruled that to constitute a valid gift *causa mortis*, there must be a delivery; that if the property "be at the time already in the possession of the donee, the donor's saying to the donee, 'You may have it,' or 'You may keep it, — it shall be yours,' does not pass the property in the case of a gift *causa mortis*."

We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is

not its only purpose. It is essential, in order to distinguish a gift *causa mortis* from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will, and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity, and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf or the delivery of a twig in the ancient mode of conveying estates, or the delivery of a kernel of corn or the payment of one cent of the purchase-money to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone cannot accomplish. Gifts *causa mortis* ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury: See *Matthews v. Warner*, 4 Ves. 187, 196, note; *Leathers v. Greenacre*, 53 Me. 561, 569. As said in *Hatch v. Atkinson*, 56 Me. 326, 96 Am. Dec. 464, it is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury.

We are aware that some text-writers have assumed that when the property is already in the possession of the donee a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts *inter vivos*, and not to gifts *causa mortis*. A gift *inter vivos* may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held in *Wing v. Merchant*, 57 Me. 383, and the jury were so instructed in this case, and the defendant had the benefit of the instruction. But the question we are now considering is not whether a gift *inter vivos* can be sustained without a distinct act of delivery, but whether such a relaxation of the law can be allowed in the case of a gift *causa mortis*. We think not. Reason and the weight of authority are opposed to such a relaxation: *Hatch v. Atkinson*, 56 Id. 324, 327; 96 Am. Dec. 464; *Lane v.*

Lane, 76 Me. 521; *Parcher v. Savings Inst.*, 78 Id. 470; *Dunbar v. Dunbar*, 80 Id. 152; *Miller v. Jeffress*, 4 Gratt. 472; *French v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147; *Delmotte v. Taylor*, 1 Redf. 417; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Kenney v. Public Administrator*, 2 Bradf. 319; 2 Kent's Com., 10th ed., 602, and note; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Walsh's Appeal*, 122 Pa. St. 177; 9 Am. St. Rep. 83.

It is the opinion of the court that the gift of a savings-bank book *causa mortis*, to be valid, must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee; and that the delivery must be made for the express purpose of consummating the gift; and that a previous and continuing possession by the donee is not sufficient; and that in this, and in all particulars, the rulings in the court below were correct; and that no cause exists for granting a new trial.

Motion and exceptions overruled.

IN ORDER TO CONSTITUTE GIFT CAUSA MORTIS of savings-bank book of deposit, the book must be actually delivered to the donee with intent to consummate the gift, otherwise it will not operate as such gift: *Tillingham v. Wheaton*, 8 R. I. 536; 94 Am. Dec. 126, and note; *Pope v. Savings Bank*, 56 Vt. 234; 48 Am. Rep. 781, and note; *Newton v. Snyder*, 44 Ark. 42; 51 Am. Rep. 587; *Burton v. Savings Bank*, 52 Conn. 398; 52 Am. Rep. 602; *Curtis v. Savings Bank*, 77 Me. 151; 52 Am. Rep. 750. A contrary opinion is expressed in *Ashbrook v. Ryon*, 2 Bush, 228; 92 Am. Dec. 481. That to constitute such gift the delivery must be complete, and retained by the donee until the donor's death, see *Dunbar v. Dunbar*, 80 Me. 152; 6 Am. St. Rep. 166, and note 169; see also *Appeal of Walsh*, 122 Pa. St. 177; 9 Am. St. Rep. 83, and note.

PRESTON v. WRIGHT.

[81 MAINE, 306.]

CO-TENANCY — CONTRIBUTION OF CO-TENANT FOR TAXES. — Where one co-tenant has paid the taxes assessed in one sum against the property belonging to all the co-tenants in order to prevent a forfeiture of his interest, and before the land was sold for the tax, the lien is thereby discharged, and equity will not create a new lien in favor of such co-tenant for reimbursement upon the interests of the other co-tenants.

J. Williamson, for the plaintiff.

W. H. Folger, for the defendants.

DANFORTH, J. This is a bill in equity, to which a demurrer has been filed.

It appears that the plaintiff and defendants are tenants in common of a certain lot of land in Northport, upon which the town had from year to year assessed taxes; that the plaintiff has for several years paid the whole of the taxes assessed thereon, the last of which was that assessed for the year 1886, and that these payments were made for the purpose of saving her interest from forfeiture. It does not appear that any steps were taken by the authorities at any time to secure a forfeiture, except once, in 1886, the lands were advertised for sale for the tax of 1884, assessed before the plaintiff had acquired a title.

The bill now asks "that a charge or claim in the nature of a lien upon the interests of said defendants in said premises, for their proportion of said sums, may be established and enforced, and that in default of the payment of such proportion, with costs and expenses, said interest may be sold in the same manner as real estate is sold on execution, and with the same right of redemption, and the money arising therefrom be in the same manner applied to her reimbursement."

There are many cases where a person pays the whole amount of an encumbrance upon real estate under a legal liability jointly with others to do so, or where he is compelled to pay for others in order to save his own share from forfeiture, he may be entitled to an assignment of that encumbrance from the owner, that he may hold and enforce it against the land for his reimbursement. No case has been cited, nor are we aware of any, which goes any further. In all these cases it is an assignment, or what is treated as such, of an actual existing encumbrance, in which the assignee succeeds to all the rights of the assignor, and none other.

Undoubtedly, a tax duly assessed under a statute giving a lien, is an encumbrance upon the land. But it is a limited or an inchoate one. It gives no title to or interest in the land until it has been sold in the way provided by statute. In this case the lien has been discharged by the payment of the tax as well as by the lapse of time. So that if the town ever had any right to assign, which may well be doubted, it has none now. Hence the plaintiff in paying the tax relieved the land of no encumbrance which could by any possibility enable or assist her in getting possession of the land, or holding it as security.

The case of *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637, was indeed a tax case. But there the lien had been perfected

by a legal sale by the proper authorities, and one of the tenants in common, while the right of redemption existed, redeemed the whole, as the only way he could save a forfeiture of his own interest. At the same time he took from the purchaser a conveyance, which was in effect an assignment of his interest, and the court held that such an interest was virtually a mortgage under which he was entitled to enter and hold until redeemed, and if not redeemed at the expiration of the right, the title would become absolute. This would seem to be a proper, plain, and simple method of proceeding, and one in conformity with well-settled principles of law.

But the plaintiff, apparently aware that she may not succeed under a right of subrogation, put the prayer of her bill in broader language, and such as may, perhaps should, be understood as asking the court to establish for her a new lien, or a charge in the nature of a lien, and enforce it by a sale as land is sold upon an execution. But surely after the lien under the statute is lost, it cannot be restored so as to be made available consistently with the statute.

Nor are we aware of any principles of law or equity upon which a new one can be established. It would seem to be equally a nullification of the statute. It is conceded that there is no personal liability for the money sought to be recovered. Then why should this particular piece of property of the defendants more than any other be liable? Not because of any lien upon it, for if there ever was one, it no longer exists. Not because the money was expended for its benefit, because even that is problematical. It was optional with the town to try the experiment of selling the land for taxes, or try some other method of collecting them; and what is perhaps of more consequence, if the land were to be sold for taxes or the money which paid them, the defendants had the right to a statute sale, and within the time allowed by the statute.

The law or the parties may impose a trust or lien upon real and personal property, and a court of equity will enforce it; but it must be a very extraordinary case where the court will impose either.

This does not seem to be a proper case for the intervention of equity; for though in the absence of correct information as to the ownership of the land it may have been competent for the assessors to have taxed it *in solido*, no reason is perceived why the plaintiff may not, by making the list for the guidance

of the assessors required by the Revised Statutes, chapter 6, section 93, have her interest taxed separately.

Demurrer sustained.

RIGHT OF CO-TENANT TO CONTRIBUTION from his co-tenants, where he has paid the taxes assessed against the whole tract: *Eads v. Retherford*, 114 Ind. 273; 5 Am. St. Rep. 611, and note 613; *Page v. Webster*, 8 Mich. 263; 77 Am. Dec. 446; Freeman on Cotenancy and Partition, sec. 322.

SAWYER v. MCGILLICUDDY.

[81 MAINE, 318.]

LANDLORD AND TENANT—DUTY TO KEEP STAIRWAY IN REPAIR.—The owner of several tenements leased to different tenants with one stairway or passage-way for the accommodation of all, and used in common by them, is, in the absence of express agreement to the contrary, in possession of such passage-way, and bound to keep it in repair at his own expense, and liable for injury to any one of his tenants happening through a defect therein, where the tenant is without fault.

F. L. Noble, for the plaintiff.

D. J. McGillicuddy and G. E. McCann, for the defendant.

DANFORTH, J. The ruling complained of in this case raises but a single question, namely, the liability of the defendant, upon the facts stated in the exceptions, "to suitably care for and maintain the passage-way or stairway for the tenants, unless there be an express agreement that he is not to maintain the stairway, at his own expense." By the ruling, this liability is imposed upon the defendant by virtue of an implied covenant. It is to be noticed that the plaintiff's right to recover is not made to rest upon this proposition alone. This is only one of the elements of her case, among many others, upon which we must assume that correct instructions were given.

It appears that the defendant was the owner of the building, including the stairway in question; that in the upper part of the building there were several different tenements leased to as many different tenants, of whom the plaintiff was one; and that the stairway was built for the accommodation of the different tenants, and used by them in common as a passage-way to their several rooms; and, as conceded in the defendant's argument, the plaintiff received the injury which is the subject of this suit, "by falling through the landing at the foot of the stairway."

In such cases, the rights and liabilities of the parties are the result of a contract between them. In the absence of an express contract, the law will imply such as shall be deemed reasonable, under all the circumstances. In this case, there was an express contract as to the tenancy, but that left the obligation to repair to such as might be implied by law. In the first instance, the burden of repairs reasonably necessary for the protection of all persons rightfully upon the premises is upon the owner; and if he would be relieved, the burden is upon him to show that the obligation has been transferred to another.

In the ordinary case of landlord and tenant, that transfer is made. The lease is an instrument of conveyance. The lessee takes the possession of the property, and has the full control of it. The landlord has no right of entry even, except so far as it may have been reserved. The tenant, for the time being, is in the place of the owner, taking the property as he finds it. These circumstances are so connected with the repairs that the law deems it reasonable and proper that in this respect, as well as in others, the tenant should take the place of the owner, and authorizes the inference that such was the intention of the parties, in the absence of controlling facts. This would also be true of all appurtenances connected with or ways to the premises, when such appurtenances and ways were included in the lease, with the same right of possession in the tenant as in the premises. This rule is now beyond controversy.

But when the reason ceases, the law ceases. Though the relation of landlord and tenant exists between these parties as to the tenement occupied by the plaintiff, it does not as to the stairway in question. Over that she has only a right of way in common with others; no right of exclusive, or any, possession, except as she is passing over it; no right of entry even for any other purpose. Hence in these circumstances we find no evidence to sustain an implied covenant on the part of the plaintiff to make the repairs, or that the obligation to do so had been transferred from the defendant, who still retained possession and control of the stairway. If this inference could be drawn against the plaintiff, it could be with equal propriety against each of the other tenants, and each would have a claim against the others severally for neglect. The obligation could not be upon all jointly, for their titles were several.

It is suggested that the defendant is not an occupant of any

part of the building. This may be true. But it is not necessary that a person should be actually in or upon the premises in order to have the possession and control of them. The defendant was the owner of the stairway, as well as the other parts of the building, and though built for the accommodation of the tenements above, and in that sense an appurtenant to though not a part of them, it was as easily divisible from them as they from each other. By his leases he made such a division, and, in effect, retained the control of the stairway, with a right to enter at any and all times to himself. He could have retained no greater right if he had retained one of the tenements for his own occupation, leasing the others as now.

But while these facts not only fail to furnish any sufficient foundation for an implied covenant on the part of the plaintiff to make the necessary repairs upon the stairway, they are abundantly sufficient to sustain such a covenant on the part of the defendant. He was the owner of the tenements, and kept them for the purpose of profit. But to insure that, there must be some means of access to them. He preferred to make one passage-way for all, rather than one for each. This was an invitation, an inducement, for all who needed such accommodation, to come and pass over this passage-way. It was a way provided for them to pass over, precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in safe and convenient repair must exist as much in one case as in the other.

But it is said that when a person has a right of way over the premises of another, the presumption is that he is bound to repair at his own expense. This may be true when the way is held under a license, to be used by the licensee for his own benefit exclusively. But such a way, and one provided as this was as an inducement to obtain tenants for the tenements or customers to the business of the person providing it, are two very different things. This distinction is clearly illustrated in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 561; 16 Am. Rep. 503. See also *Stratton v. Staples*, 59 Me. 94.

Thus it is evident that the ruling in question rests upon sound principle.

We are of the opinion that, though there may be some conflict in the decisions, real or apparent, the preponderance of authority will bring us to the same result. In Massachusetts the question seems to have been clearly settled in accordance with the ruling. The same principle runs through all the

cases, that the obligation to repair, in the absence of any express agreement, depends upon the right of possession, and that an appurtenant attached to and made for the accommodation of several different tenements leased to different tenants remains in the possession of the lessor, though the use of it goes to the lessees.

Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735, was the case of an awning made for and attached to a block containing three shops leased to different tenants. It was held that though all had the use of the awning, yet the possession remained in the landlord, and he was held liable for any defects in it.

Elliot v. Pray, 10 Allen, 378, 87 Am. Dec. 653, is in point, showing that under similar circumstances the landlord, and not the tenant, is bound to keep the passage-way in repair.

In *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346, the whole building was leased to different persons in tenements, under leases requiring the tenants to make repairs, and yet it was held that the possession of the roof, however necessary to all, was not conveyed to any one of the tenants, nor to all jointly, and was therefore left in the owners, who were liable for new repairs.

Readman v. Conway, 126 Mass. 374, in principle is not distinguishable from the one at bar. Three tenements, with a platform in front for the benefit of all, were leased to different persons. In the opinion it is said: "If the lease to each tenant was of the shop occupied by him, and the landlords had constructed the platform for the common use and benefit of all the shops and the public, there would be no presumption, in the absence of any agreement to that effect, that the tenants were to keep the platform in repair. Neither tenant acquired any exclusive right to use or control the part in front of his shop, and there is no such leasing of the platform as would exonerate the landlord from responsibility for defects in it."

Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295, is in every respect like the one under consideration, and sustains the ruling.

In this state, the same question does not appear to have arisen, but the cases tend the same way: *Campbell v. Portland Sugar Co.*, *supra*; *Toole v. Beckett*, 67 Me. 544; 24 Am. Rep. 54, and cases cited.

In *Bold v. O'Brien*, 12 Daly, 160, it is held that a tenant of a part of a building is not bound to make general repairs. If

the landlord fails to make them, and the building falls, he is liable to the tenant.

In *Donohue v. Kendall*, 50 N. Y. Sup. Ct. 386, it is held that the owner of a tenement-house owes to his tenants of apartments therein, and to strangers rightfully on the premises, the duty of keeping the stairways and hallways in repair.

So far as our attention has been called to other cases in defense, or any we have been able to find, we do not think them sufficient to overcome the authority of those above cited, and others similar. Some of them rest upon temporary obstructions, or, as in *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255, and *Woods v. Cotton Co.*, 134 Mass. 357, where the obstructions were accumulations of ice and snow. We see no reason to complain of these and such like decisions. They are not founded upon a defect in the thing itself, and so are not in conflict with our decision in the case at bar. Nor do we intend to decide that the landlord is liable for any fault of the tenant; nor is it a necessary inference that he would be holden for a defect in the construction of the stairway, or existing before the lease. It might be that in the case of a tenant, in the absence of hidden defects, he would be bound by the condition of the stairway, the time of the lease, and bound to keep it clear from the accumulation of temporary obstructions arising from use or from natural causes, as ice and snow, leaving the landlord liable for repairs made necessary by the ordinary use or decay. These several questions do not arise in this case, and we give no opinion upon them. An examination of the cases upon this subject will show, we think, that much of the apparent conflict in them arises from the fact that different questions are involved.

Exceptions overruled.

LANDLORD LETTING ROOMS IN SAME BUILDING to different tenants, the building having a common stairway for the use of all, is bound to keep it in reasonable repair: *Looney v. McLean*, 129 Mass. 33; 37 Am. Rep. 295; see the same case, cited with others to the same effect, in note to *City of Lowell v. Spaulding*, 50 Am. Dec. 778, 779. At common law, there was no duty upon a landlord to put the property in any particular condition, or to keep the same fit for any particular purpose: *Sieber v. Blanc*, 76 Cal. 173; but when a landlord rents a building for a particular purpose, and covenants to repair, it is his duty to put the building in such a state of repair as the business requires: *Riley v. Pettis County*, 96 Mo. 318.

GORE v. CURTIS.

[81 MAINE, 403.]

CRIMINAL LAW — ADULTERY — EVIDENCE OF SPECIFIC ACTS OF UNCHASTITY.

— In trespass for assault upon and for soliciting the plaintiff, a married woman, to commit adultery with defendant, he is not permitted to show specific acts of unchastity by her with other men prior to the alleged assault, in mitigation of damages, and to rebut the probability of alleged force.

Savage and Oaks, for the defendant.

G. C. and C. E. Wing, for the plaintiff.

HASKELL, J. In trespass for assault upon and for soliciting the plaintiff, a married woman, to commit adultery with the defendant, can he be permitted to show specific acts of unchastity by her with other men prior to the alleged assault, in mitigation of damages, and to rebut the probability of alleged force?

At the trial, the court excluded the evidence; and the learned counsel for the defendant, in the opening paragraph of their brief, say: "We are aware that the ruling was in accordance with the law of half a century ago." The court is not aware of any change in the law since that time. No statute intervenes, nor is the reason for the rule less cogent now than it always has been, whereby the rule is obsolescent, even.

Evidence tending to show the plaintiff's general reputation for unchastity was admitted. Persons seeking damages in actions of this sort must be prepared to defend their general character; but are not required to come ready to explain the various specific questionable acts of their lives, and to rebut false accusations, of which they can have no premonition. It would be a hard rule that would compel a plaintiff to defend every act of his life as the price of justice.

Exceptions overruled.

ADMISSIBILITY OF EVIDENCE OF CHASTITY of the woman in prosecutions for adultery: *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *State v. Bridgman*, 49 Vt. 202; 24 Am. Rep. 124; *Commonwealth v. Gray*, 129 Mass. 474; 37 Am. Rep. 378.

EVIDENCE — PRIOR ACTS OF UNCHASTITY. — As to the admissibility in evidence of prior acts of unchastity in seduction cases, see monographic note to *People v. De Fore*, 8 Am. St. Rep. 870-872.

PHINNEY v. PHINNEY.

[81 MAINE, 450.]

CONSTITUTIONAL LAW. — OBLIGATION OF CONTRACTS, protected by federal and state constitutions, is not derived solely from the acts and stipulations of the parties independent of existing law, but has vitality, and subsists outside the stipulations expressed by the parties.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS. — The laws existing at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction, and discharge, but also those in relation to its enforcement.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS. — A state may, to a certain extent, and within proper bounds, regulate a remedy; yet if by subsequent statute it so changes the nature and extent of existing remedies as to materially impair the rights and interests of a party to a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests, and is unconstitutional and void.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT. — The constitutional prohibition against the impairment of a contract secures from attack, not merely the contract itself, but all the essential incidents which render it valuable, and enable its owner to enforce it.

CONSTITUTIONAL LAW — STATUTE IMPAIRING THE OBLIGATION OF CONTRACTS. — Chapter 129 of the Laws of Maine, 1877, provides that where a debtor has mortgaged real estate to secure performance of a collateral agreement other than the payment of money, and proceedings have been commenced to foreclose the mortgage, and the time of redemption has not expired, a creditor having attached the mortgagor's interest may file a bill in equity to ascertain if the conditions of the mortgage have been broken; and if they have, a decree may be entered enabling him, by fulfilling the requirements imposed by the court, to hold the property to satisfy his demand; and pending such proceedings, the right of redemption shall not expire by any attempted foreclosure, and is unconstitutional and void, as to existing mortgages, as impairing the obligation of the contract, and abrogating a right which the mortgagee had by statute when the mortgage was executed of a fixed and definite period for foreclosure of the equity of redemption.

H. M. Heath, for the plaintiff.

S. S. Hackett, for the defendants.

FOSTER, J. The object of this bill is to enable an attaching creditor of the mortgagor, pending proceedings for foreclosure, to step in, postpone the time for the expiration of the right of redemption, and enable him to fulfill the requirements devolving on the mortgagee, agreeably to chapter 129, Laws of 1887.

This statute provides that in all cases where a debtor has mortgaged real estate to secure the performance of a collat-

eral agreement other than the payment of money, and proceedings have been commenced to foreclose the mortgage, and the time of redemption has not expired, a creditor of the mortgagor having attached the mortgagor's interest may file a bill in equity, and the court is thereupon authorized to ascertain whether there has been a breach of the conditions of the mortgage, and if such is found to be the fact, to pass any order or decree, and thereby enable the creditor, by fulfilling such requirements as the court may impose, to hold the property, or such right as may be acquired by virtue of such attachment, for the satisfaction of his claim. And it is therein provided that, "pending such proceedings, the right of redemption shall not expire by any attempted foreclosure of such mortgage."

The mortgage in question was given long prior to this enactment, and was to secure performance of an agreement of the mortgagor to maintain the mortgagees, and the survivor of them, during their natural lives, in a comfortable manner, according to their station in life, and at their decease to pay their funeral charges.

Proceedings for the foreclosure of this mortgage had been commenced, and the time for redemption had nearly expired, when this bill was brought.

The defense interposed by demurrer, and pressed upon our consideration, is, that the statute, if retrospective, and therefore operative upon this mortgage, is unconstitutional, and consequently void so far as this mortgage is in question; that it is in contravention of that provision of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

That it was intended to act retrospectively, and apply to mortgages existing at the date of its enactment as well as to such as should thereafter be made, there can be no question.

The contract under consideration falls within the provisions of this act, and the question to be determined is, whether the statute in respect to this contract is valid, or whether the legislature in enacting it transcended its power.

The constitution of the United States (art. 1, sec. 10) declares that no state shall pass any law which "impairs the obligation of contracts." If the act in question, so far as it relates to contracts existing at the date of its passage, is within the inhibition of the constitution, it is to that extent inoperative and void. It is insisted that this mortgage, hav-

ing been given long prior to the act, must be governed by the law then existing, both as to its redemption and foreclosure, and that the law in relation to it then in force became a part and parcel of the contract, and so annexed to it that any extension of the time of foreclosure or redemption would impair the obligation guaranteed by the constitution.

It is now well settled that contracts do not derive their obligation solely from the acts and stipulations of the parties, independent of existing law. This obligation has vitality, and subsists outside of the stipulations expressed by parties in their contracts. And, in accordance with this principle, the highest courts in this country have in very many cases laid down the doctrine that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction, and discharge, but also those in relation to its enforcement: *Von Hoffman v. City of Quincy*, 4 Wall. 550. "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence": *Edwards v. Kearzey*, 96 U. S. 600.

At the time when this contract was made, the statute law of the state provided specific modes by which the mortgagee of real estate might foreclose his mortgage, after breach of the condition on the part of the mortgagor, and it specifically defined the time in which the mortgagor might redeem the estate after commencement of proceedings under the statute to foreclose the equity. That time, where no express agreement for a shorter period had been inserted in the contract, was a fixed and definite term of three years. At the expiration of that term, if there had been no redemption, the estate would vest in the mortgagee, and he would thereby become invested with an indefeasible title. The rights of the mortgagor and mortgagee were well and clearly defined, and existed by positive law. There was no indefinite equity of redemption, created by courts of equity and enforceable in those courts, as in many of the states: *Kennebec etc. R. R. Co. v. Portland etc. R. R. Co.*, 59 Me. 25, 30; but the right of equity and the right of foreclosure were creatures of the statute. The rights of the mortgagee were no less valuable to him than were those of the mortgagor. If existing and secured to him, from the

nature of the contract and the laws in force at the time of its execution, those rights were as inviolable as were those of the mortgagor.

Does the legislative act upon which this bill is founded so affect the rights of the mortgagee that the obligation of his contract is impaired, and thus entitle him to protection at the hands of the court?

While it is not intended to disturb the proper application of the principle that a state, to a certain extent and within proper bounds, may regulate the remedy, yet if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it.

Thus it was said in the case of *Planters' Bank v. Sharp*, 6 How. 301: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, — dispensing with any part of its force." The doctrine is also there asserted, that if, in professing to alter the remedy only, the rights of a contract itself are changed or impaired, it comes within the spirit of the constitutional prohibition, and when the remedy is entirely taken away, or clogged "by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired." "And the test, as before suggested," remark the court, "is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone."

In *Louisiana v. New Orleans*, 102 U. S. 206, Mr. Justice Field, in the course of the opinion, says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." See also *Green v. Biddle*, 8 Wheat. 84.

The result arrived at in all the decisions bearing upon this question seems to be, that the legislature may alter or vary existing remedies, provided that in so doing their nature and extent is not so changed as materially to impair the rights and interests of parties to existing contracts.

This rule, while somewhat vague and unsatisfactory, is the most certain general one of which the nature of the subject admits. The difficulty arises in its application to particular cases, and distinguishing between what are legitimate changes of remedy and those which impair the the obligation of contract. Every case must be determined, in a great degree, by its own circumstances.

In a leading case upon this point in the United States court (*Bronson v. Kinzie*, 1 How. 311), the distinction between legislation affecting the remedy only, and that which transcends the constitutional limit, is carefully given. In that case, as in this, the legislation pertained to the extension of time for the redemption of mortgages. A mortgage was executed in Illinois containing a power of sale under a decree of foreclosure. Subsequently, an act of the legislature was passed giving the mortgagor twelve months, and any judgment creditor of the mortgagor fifteen months, within which to redeem the mortgaged property from a judicial sale, and prohibiting its sale for less than two thirds of its appraised value. The court held the act void as applied to mortgages executed prior to its passage. It was contended in argument in support of the act, as in the case now before us, that it affected only the remedy of the mortgagee, and did not impair the contract. But the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void, and one which took away all remedy to enforce it, or encumbered the remedy with conditions that rendered it useless or impracticable to pursue it. The language of Chief Justice Taney, who delivered the opinion of the court, in reference to that statute has an appropriate bearing upon the case before us, and therefore we cannot forbear quoting it: "This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to ingraft upon it new conditions injurious and unjust to the mortgagee. It declares that although the mortgaged premises should be sold under the decree of the court of

chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. The law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties unquestionably impairs its obligations, and is prohibited by the constitution."

This decision has since been repeatedly affirmed.

The case of *McCracken v. Hayward*, 2 How. 611, arose the following year under the same statute law of Illinois, and the same question was involved as in *Bronson v. Kinzie*, 1 Id. 311, except that it arose upon the sale of real estate upon execution. The court arrived at the same conclusion as in the former case.

The same is true in the case of *Gantley's Lessee v. Ewing*, 3 How. 716, which arose under a similar statute in Indiana, and the court there held that the legislature could not, by such a law, impair or defeat the obligation under the disguise of regulating the remedy.

The question was again before the court in *Howard v. Bugbee*, 24 How. 461, upon a statute of Alabama allowing a judgment creditor of a mortgagor to redeem the land within two years after a sale under a decree of foreclosure of the mortgage, and the decision of the court, in accordance with the foregoing principles of the cases cited, was, that the statute was unconstitutional, as impairing the obligation of the contract of mortgages, as to all such mortgages as were in existence when the statute was enacted.

In various forms and numerous cases, the principle has come before the courts; but the doctrine established by the

decisions to which we have referred has been firmly adhered to by the supreme court of the United States and the court of last resort in most of the states. Additional authorities might be cited indicating the judicial sentiment and opinion upon this question: *Malony v. Fortune*, 14 Iowa, 417, and *Cargill v. Power*, 1 Mich. 369, where an extension of time for the redemption of a pre-existing mortgage was held unconstitutional; *Blair v. Williams*, 4 Litt. 34, a law extending the time of a replevin bond beyond that in existence when the contract was made held unconstitutional; *Gunn v. Barry*, 15 Wall. 610, and *Edwards v. Kearzey*, 96 U. S. 595, where it was so held in relation to statutes exempting from sale on execution any substantial part of the debtor's property not so exempt at the time the debt was contracted; *Brine v. Insurance Co.*, 96 Id. 627, 637, laws in existence in regard to real estate when a contract is made in relation thereto, including the contract of mortgage, enter into and become a part of such contract. See also *Ex parte Christy*, 3 How. 328; *Clark v. Reyburn*, 8 Wall. 322; *Walker v. Whitehead*, 16 Id. 317, 318; *Kring v. Missouri*, 107 U. S. 233; *Memphis v. United States*, 97 Id. 293; *Seibert v. Lewis*, 122 Id. 284, 294; *Butz v. City of Muscatine*, 8 Wall. 575; *Mobile v. Watson*, 116 U. S. 305; *Curran v. State of Arkansas*, 15 How. 319.

In the case last cited, it was said by the court that "it by no means follows, because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of contract no longer remains the same."

It is, however, argued in support of the statute before us, that it violates no constitutional provision, and several decisions are cited in support of the plaintiff's position. The principal one is that of *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283, where the court held that a general statute permitting defendants in actions to foreclose mortgages to have six months to file answers, and requiring six months' notice before sale on decree, was valid even as to pending actions, although under former practice the defendant had but twenty days. The court, notwithstanding, admitted the correctness of the doctrine laid down by the supreme court in *Bronson v.*

Kinzie, 1 How. 311; *McCracken v. Hayward*, 2 Id. 611; and *Curran v. State*, 15 Id. 319; but said that the case did not come within either of those decisions; that the remedy of the mortgagee as it previously existed was in all its parts substantially continued, and that no new conditions were ingrafted upon it. "A complete and substantial remedy was left them," remark the court in conclusion, "according to the course of justice as it was administered before its passage, the only difference being that it was less expeditious, but not so much so as materially to affect or diminish their rights."

Holloway v. Sherman, 12 Iowa, 282, 79 Am. Dec. 537, is also cited. This was a case where the statute regulating the foreclosure of mortgages by proceedings in equity gave the defendant nine months additional in which to file an answer. The court admitted that it was unable to fix with precision the dividing line between acts strictly remedial and those impairing the obligation of contracts, and held the law valid, inasmuch as it "simply gave to the defendant an enlarged time for answering, leaving the remedy of the plaintiff in all other respects just as it existed under the previous law."

Nor does the case of *Bridgeport Savings Bank v. Eldridge*, 28 Conn. 556, 73 Am. Dec. 688, to which our attention has also been called, militate against the doctrine enunciated in the decisions of the United States supreme court before cited. It was a case where a second mortgagee had acquired by foreclosure the right of redemption after the time allowed to redeem had expired under a decree of foreclosure; it was simply a question whether sufficient ground was shown for opening a decree of the court of equity, and whether a court of equity possesses the power of reopening a decree of foreclosure and extending the time of redemption. The court there say that this power is inherent in the court that made the decree is too well settled to need citation of authorities.

It will be noticed that in these decisions the foreclosure was under proceedings in equity, where the court of chancery was authorized to decree foreclosure, — a proceeding which has never existed in this state: *Kennebec etc. R. R. Co. v. Portland etc. R. R. Co.*, 59 Me. 31. As we have remarked, foreclosure in one of the modes provided by law is fixed by positive statute enactments, and does not depend upon any decree of the chancellor. It is not subject to that degree of flexibility, both as to time and process, which exists in those jurisdictions where foreclosure proceedings are relegated to courts of equity.

The remedies there are more elastic than under a system where the time of redemption is known and understood to be for a fixed and definite term. So long as we maintain that the remedy furnished by the laws at the time the contract is entered into constitutes a part of the obligation (*Walker v. Whitehead*, 16 Wall. 314), so long must we see that it is not materially impaired by any disguise of remedial legislation. The doctrine of remedy must not affect the doctrine of rights. The latter is superior to the former, and guaranteed not only by the federal but every state constitution.

While we admit the difficulty in some cases of determining whether the change in the remedy has thus materially impaired the rights and interest of the creditor, we do not think any such difficulty exists in this case. The act in question abrogates a right which the defendant had as mortgagee, at the time the mortgage was given, of a fixed and definite period for the foreclosure of the mortgagor's equity. By this act that which was before certain is rendered uncertain. It expressly provides that pending proceedings between the mortgagor and any of his creditors who may have a claim against him, and who may see fit to enforce it by attachment and subsequent bill in equity, the right of redemption shall not expire by any attempted foreclosure of such mortgage. Litigation upon such a claim may be protracted for months, or even years. If the claim is a valid one, then an equitable interest is conferred upon one other than the mortgagor, with rights against the mortgagee of paying such damages as a court of equity may assess, and fulfilling requirements which, as in this case, by the terms of the mortgage contract devolved upon the mortgagor to fulfill personally: *Bryant v. Erskine*, 55 Me. 156; *Eastman v. Batchelder*, 36 N. H. 141, 149; 72 Am. Dec. 295; *Clinton v. Fly*, 10 Me. 296. The right of redemption and the time for foreclosure may thus be so prolonged as materially to diminish the security of the mortgagee, notwithstanding he may be allowed possession of the premises. The rights conferred upon the judgment creditor are directly in conflict with the rights of the mortgagee acquired when the mortgage was made.

"If such rights may be added to the original contract by subsequent legislation," said the court in *Bronson v. Kinzie*, 1 How. 311, "it would be difficult to say at what point they must stop."

The conclusion to which we have arrived in reference to

this statute, as applied to pre-existing contracts, renders any further consideration of the case unnecessary.

Demurrer sustained.

PROVISIONS OF EXISTING LAW ENTER INTO and form a part of the obligations of every contract. This obligation does not inhere in the contract itself *proprio vigore*, but in the law applicable to the contract: *Aycock v. Martin*, 37 Ga. 124; 92 Am. Dec. 56, and note; *Von Baumbach v. Bade*, 9 Wis. 559; 76 Am. Dec. 283; *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358.

LAW IMPAIRS OBLIGATION OF CONTRACT if it enlarges, abridges, or in any manner changes the intentions of the parties resulting from the stipulations in the contract: *State v. Carew*, 13 Rich. 498; 91 Am. Dec. 245, and note 262; *Robinson v. Magee*, 9 Cal. 81; 70 Am. Dec. 638; *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 339; 44 Am. Dec. 593; *Winter v. Jones*, 10 Ga. 190; 54 Am. Dec. 379.

LEGISLATURE MAY CHANGE REMEDY, so long as it does not substantially impair it or the obligation of the contract: *Holloway v. Sherman*, 12 Iowa, 282; 79 Am. Dec. 537, and note; *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468; *Cook v. Gray*, 2 Houst. 455; 81 Am. Dec. 185; *Coffman v. Bank*, 40 Miss. 29; 90 Am. Dec. 311, and note 320; *Richardson v. Cook*, 37 Vt. 599; 88 Am. Dec. 622.

MILLETT v. BLAKE AND WILLEY.

[81 MAINE, 531.]

IDEM SONANS. — Where the name Kealiher is spelled Keolliher, Kelliher, Kellier, Keolhier, Kelhier of Lagrange, in proceedings against Eliza A. Kealiher to foreclose a mortgage, the names are *idem sonans*, and sufficient to identify the defendant.

EXECUTIONS — SALE — NOTICE TO DEBTOR. — Where the debtor's residence is described in the execution and other proceedings for the sale of his land, and the officer's return shows that he gave notice "to the judgment debtor in this execution" by mail, postage paid, he not being a resident of his county, it will be inferred that notice was given by mail directed to the debtor's residence, as stated in the execution, and as required by statute.

EXECUTIONS — SALE — SUFFICIENCY OF RETURN. — Where the return of the officer states that he took and sold "all the right, title, and interest" of the judgment debtor in and to the land described, such return is sufficient to pass all the right, title, and interest of the debtor. This under chapter 76, section 42, Revised Statutes of Maine.

MORTGAGES. — **ASSIGNEE OF MORTGAGE**, who has no interest therein at the time of an attachment of the equity of redemption, though a necessary party to the action, is not entitled to tender nor demand of the amount due on the mortgage by the plaintiff claiming the right of redemption under the attachment.

Henry Hudson, for the plaintiff.

J. B. Peaks and C. A. Everett, for the defendants.

LIBBEY, J. This is a bill in equity to redeem a lot of land situated in Orneville, Piscataquis County, from a mortgage given by Eliza A. Kealiher to Joseph L. Smith, dated April 16, 1880, recorded April 17, 1880, and assigned by said Smith to the defendant Blake, April 15, 1881, and recorded on the 18th of the same month.

The complainant claims the equity of redemption by virtue of an attachment on a writ in favor of *George W. Canney v. Eliza A. Kealiher*, on the twenty-fourth day of March, 1881; judgment duly entered in that action; execution issued thereon; sale of the land by an officer on the execution to said Canney, and deed from Canney to him dated November 12, 1883, recorded on the next day.

The defendants claim the land by conveyance from said Eliza A. Kealiher. They raise four objections to the validity of the plaintiff's title.

1. The want of identity as to mortgagor and the defendant in said attachment, judgment, and sale. The name of the mortgagor in the mortgage is Eliza A. Kealiher of Lagrange. In the action, attachment, and subsequent proceedings, the name appears spelled as follows: in the writ, Eliza A. Keolihier of Lagrange; in the return of attachment, Eliza A. Kelihier; in the officer's certificate to the registry of deeds, Eliza A. Kellier; in the execution, Eliza A. Keolhier of Lagrange; in the return upon execution, Eliza A. Kelhier; in the sheriff's deed, Eliza A. Keolhier of Lagrange. The land described in the officer's return of sale and in his deed to Canney is the same as that described in the mortgage.

Notwithstanding this difference in the spelling of the name in the proceedings relied upon, we think the sound in pronunciation substantially the same. The residence of the party described when given is the same. The subject-matter in which the name is used throughout is the same. It is worthy of remark that while the name of the mortgagor in the mortgage is Kealiher, that the defendant Blake, in his notice of foreclosure of that mortgage, spells it Kelliher, one of the modes of spelling which he objects to in the proceedings relied upon by the plaintiff. We think the proceedings relied upon sufficiently establish the identity of the mortgagor throughout: *Tibbetts v. Kiah*, 2 N. H. 557; *Colburn v. Bancroft*, 23 Pick. 58; *Commonwealth v. Mehan*, 11 Gray, 322; *Commonwealth v. Gill*, 14 Id. 400; *Commonwealth v. Jennings*, 121 Mass. 47; 23 Am. Rep. 249.

2. It is claimed that the date of the attachment was misstated in the officer's certificate to the registry of deeds. It is claimed by the defendants that the date of the attachment, as stated in the certificate, is March 29th instead of March 24th. The date of the certificate returned to the registry is March 24, 1881. The original certificate returned to the registry is exhibited to the court for inspection. Although the second figure in the date of the attachment is somewhat obscure, still, taken in connection with the date of the certificate itself, we read the date as March 24th, and not 29th.

3. It is claimed that the sale by the officer is invalid for want of proper notice. That the proper notice, as appears by the officer's return, was posted in the town where the land was located, and in two adjoining towns, and published in a newspaper as required by law, is not questioned. After stating the posting of the notices in the towns, the officer, in his return, says: "And having forwarded to the judgment debtor in this execution a like notice by mail, postage paid, she not being a resident of Piscataquis County," more than thirty days before the sale. It is objected that this is not a sufficient return of notice to the debtor, because it does not appear directly to what place or post-office the notice was sent. When the debtor's land is taken on execution and transferred to the creditor by levy or sold at auction, the general rule is, that the officer's return shall state in substance that every act was done required by statute to constitute a valid levy or sale.

It is not necessary, however, that the officer should state in his return, in direct terms, the performance of such acts. No particular phraseology is required. It is sufficient if it appears by the language used, or can be reasonably and fairly inferred from it, that the act was done. As in *Sturdivant v. Sweetsir*, 12 Me. 520, where the officer, in his return of a levy, stated that the debtor refused to appoint an appraiser, and he appointed one for him, the court held that that was a sufficient statement by the officer that reasonable notice was given to the debtor for that purpose. And in *Bugnon v. Howes*, 13 Id. 154, where the officer, in his return of a levy, stated that the debtor neglected to appoint an appraiser, and he appointed one for him, it was held a sufficient statement by the officer of notice to the debtor; because, if notice had not been given, a return of the officer that the debtor refused to appoint or neglected to appoint would be false.

In the case at bar, the debtor resided in Lagrange, was so

described in the execution, and in all the proceedings. The officer states that he forwarded the notice "to the judgment debtor in this execution" by mail, postage paid, she not being a resident of his county. When the debtor is not a resident of the county where the land lies, the statute provides that the notice may be given by the officer to him by mail, postage paid. The question here is, whether it may be fairly inferred, from the language used, that the notice was given the debtor by mail, directed to her at her residence, as stated in the execution. Something may be inferred as to the correctness of the action of a public officer when the law requires him to do a certain act: *Snow v. Weeks*, 75 Me. 105. We think it may be fairly inferred, from the officer's statement, that the notice was directed to the debtor at her residence, as stated in the execution. If not, it cannot be true that he forwarded it to the judgment debtor in the execution through the mail. If not directed to her at her residence, but directed elsewhere, it was not forwarded to her through the mail; and the officer would be liable for a false return.

4. It is claimed that the sale of the land or of the equity of redemption is invalid, because the officer returns only that he took and sold "all the right, title, and interest which said Eliza A. Kelhier had on the twenty-fourth day of March, A. D. 1881, in and to" the land described.

The defendants' contention is, that such a return of a seizure and sale is unauthorized by law, that the officer should say that he seized and sold the land. By Revised Statutes, chapter 76, section 42, "real estate attachable may be taken on execution and sold, as rights of redeeming real estate mortgaged are taken on execution and sold. . . . Such seizure and sale pass to the purchaser all the right, title, and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption."

Prior to the enactment of this statute, the right to redeem the debtor's lands under mortgage could be acquired by the creditor by levy of his execution upon the lands, as provided in said chapter, or by seizure and sale of the equity of redemption. If by levy, the amount due upon the mortgage would be deducted from the appraised value of the land taken. So that, by either mode, the creditor took the right to redeem only. Under section 42, the right of the creditor was enlarged,

so that he might sell a debtor's lands instead of making the levy, and in that way take all of the right, title, and interest that he has in the lands, of any nature.

It is the settled law of this state that an attachment of all the right, title, and interest which the debtor has in lands is a good attachment of the land itself. And the question presented here is, whether, under this enlarged remedy of the creditor, a seizure and sale of all the debtor's right, title, and interest, as rights of redeeming real estate mortgaged are taken on execution and sold, will pass to the creditor the debtor's right of redemption where the land is mortgaged. We think it will. We can see no good reason, and no sufficient reason has been pointed out by counsel, why the statute should not be so construed. We think such a seizure and sale will pass to the creditor all the debtor's right, title, and interest in the land, whether it be a fee or a less estate.

The same question came before the court in Massachusetts, in *Woodward v. Sartwell*, 129 Mass. 210, under the statute of that state of 1874, chapter 188, which, in terms, is substantially, if not precisely, like section 42 of our statute, and was elaborately considered by that court. And the court held that the seizure and sale of all the right, title, and interest of the debtor by the officer upon execution passed to the creditor the title to the land, as against a prior unrecorded deed of the debtor. The reasons for that construction are fully stated in the opinion by Judge Endicott in that case, and we adopt them here without restating them.

But the defendants say, assuming the plaintiff's title to the equity to be valid, this bill cannot be maintained, because it does not allege a tender of the amount due on the mortgage to Willey, or a demand on him for an account and a refusal or neglect to render one.

We think the answer to this position is, that by the case as reported, it does not appear that Willey had any interest in the mortgage from Kealiher to Smith, which the plaintiff seeks to redeem. The attachment under which the plaintiff holds was made March 24, 1881. Kealiher at that time held the equity of redemption. She conveyed to Blake April 14, 1881, and Blake mortgaged to Willey on the same day. Smith assigned the Kealiher mortgage to Blake April 15, 1881, so that it appears that when Blake made his mortgage to Willey, he had no interest in the Smith mortgage. It follows, therefore, that Willey has no right to the money due on

that mortgage. He is a proper party in this process, because he claims under Blake, and contests the validity of the plaintiff's title.

The result is, that the plaintiff has a right to redeem the Smith mortgage. The amount due may be assessed at *nisi prius*, or a master in chancery may be appointed.

Bill sustained. Costs for plaintiff.

DOCTRINE OF IDEM SONANS applies whenever the names are indistinguishable in ordinary conversation: *Barnes v. People*, 18 Ill. 52; 65 Am. Dec. 699, note 701.

COURT WILL PRESUME THAT OFFICER has performed his duty in relation to notice of sale: *Culbertson v. Milhollin*, 22 Ind. 362; 85 Am. Dec. 428; *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701, note 706.

OFFICER'S RETURN. — SUFFICIENCY OF, to pass debtor's title to purchaser: *Ladd v. Wiggin*, 35 N. H. 421; 69 Am. Dec. 551; *Coffee v. Silvan*, 15 Tex. 354; 65 Am. Dec. 169; *Hunt v. Loucks*, 38 Cal. 372; 99 Am. Dec. 404, and notes to these cases.

ANDREWS v. PORTLAND.

[79 MAINE, 484.]

OFFICER OF A CITY MAY RECOVER HIS SALARY from such city during a time when he had been wrongfully removed from the office, and it was in the possession of another person, who had been appointed to fill the vacancy made by such removal, though the city paid such salary to the incumbent of the office, if at the time of such payment it had notice that the officer *de jure* denied the validity of the proceedings resulting in his removal.

OFFICER DE FACTO HAS NO LEGAL RIGHT TO THE EMOLUMENTS OF AN OFFICE, the duties of which he performs under the color of an appointment, but without legal title.

RECOUPMENT. — In an action against a city by an officer *de jure* for his salary during the time he was kept out of his office, the city is not entitled to a credit by way of recoupment of the amount which the plaintiff earned by his personal services during the time involved.

William L. Putnam and C. W. Goddard, for the plaintiff.

Joseph W. Symonds, for the defendant.

LIBBEY, J. The plaintiff was duly appointed city marshal of Portland, March 31, 1883, was duly qualified April 2, 1883, and performed the duties of the office till May 1, 1884, when, by proceedings had before the mayor and aldermen of said city, he was formally removed. May 14, 1884, one Decelle was appointed by the mayor, with the advice and consent of the board of aldermen, to said office, to fill the assumed

vacancy. He performed the duties of the office under that appointment till March 6, 1885.

The salary of the city marshal was fixed by the city council of Portland at thirteen hundred dollars a year, payable quarterly, on the first days of January, April, July, and October, and he was required to provide, at his own expense, a horse and carriage for his official use.

On May 6, 1884, the plaintiff protested to the board of aldermen against his removal, claimed the right and offered to continue to perform the duties of the office.

He refused to surrender the keys to the marshal's office, held himself ready to perform the duties of marshal, keeping his team therefor till he was reinstated. During the time of his suspension he earned by his person labor \$495.

May 17, 1884, the plaintiff filed his petition for a writ of *certiorari* to quash the proceedings of his removal, and on proceedings duly had thereon, this court held that the proceedings were not in conformity to law, and void, and that the plaintiff was legally entitled to the office of marshal. This decision was announced May 1, 1885: *Andrews v. King*, 77 Me. 224.

From May 14, 1884, to March 7, 1885, the salary was paid by the city to Decelle.

The question in contention in this action is, whether the plaintiff can recover of the city his salary from May 14, 1884, to March 7, 1885, while the duties of the office were performed by Decelle, and the salary paid to him. We think he can.

The plaintiff was marshal *de jure*. His salary was fixed by law. The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited: *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *McVeany v. Mayor*, 80 N. Y. 185; 36 Am. Rep. 600; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; 55 Am. Rep. 835.

A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto*. In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court says: "It is abundantly settled by authority that an officer *de facto* can, as a general

rule, assert no right of property, and that his acts are void, as to himself, unless he is also an officer *de jure*." In Cro. Eliz. 699, the doctrine is tersely stated as follows: "The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conusant of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good": *Pooler v. Reed*, 73 Me. 129; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409; *McVeany v. Mayor*, 80 N. Y. 192; 36 Am. Rep. 600; *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *Nichols v. MacLean*, 101 N. Y. 526; 54 Am. Rep. 730; *McCue v. County of Wapello*, 56 Iowa, 698; 41 Am. Rep. 134; *People v. Potter*, 63 Cal. 127. Hence it was held in *Nichols v. MacLean*, *supra*, after a careful examination of authorities, that the *de jure* officer, who was prevented from performing the duties of the office by an illegal removal, might recover of the *de facto* officer, who performed the duties under color of an appointment, the salary which he had drawn while performing them. This result can be reached only on the ground that the *de facto* officer has no right to the emoluments of the office.

But it is contended by the learned counsel for the defendant that, admitting the foregoing propositions to be well founded, still Decelle was exercising the duties of the office in fact, under color of title upon which the defendant might well act, before his legal right was decided, and be legally protected in paying the salary to him. We think this contention, when tested by the facts of the case and well-established legal principles, is unsupported by logic or sound reason. The city had full notice of the plaintiff's claim as the legal officer, and that the title to the office was in litigation. It must be held that it knew that the legal title to the office would draw with it the salary. May it assume to determine the question of legal right between the parties before decided by the court, pay to the one having no legal title, and then successfully set up its action in defense of the claim of the one having the legal right? May A, who holds a fund claimed by B and by C, with full notice of the claim of each, elect to determine between them, and pay to B, who has a *prima facie* right, and set up the payment as a defense to the claim of C, who has the legal title? It is perfectly well settled that he cannot. If he elects, it is at his peril. He is not required to do so. He may await an action at law, and then bring both claimants into court by bill of interpleader to litigate their title; or he may

bring the bill at once without waiting for the commencement of an action at law. Here the city was in no peril. It might have refused to pay to either till the title to the office was determined; or by bill of interpleader, it might have brought the parties into court to litigate their title to the salary.

It is well settled that an office which has attached to it emoluments has a pecuniary value, although primarily it is an agency for public purposes, and that the right to the emoluments follows the legal title to the office: *Nichols v. MacLean*, *supra*; *Andrews v. King*, 77 Me. 231. The officer cannot be deprived of his office without due process of law. Can it be that while the action of the mayor and aldermen of Portland, in the attempted removal of the plaintiff, was illegal and void as affecting his title to his office, it deprives him of his salary, all that was of pecuniary value to him? Such a contention has no support in well-established legal principles. It would give the mayor, having the power of removal for cause, by the consent of the aldermen, the opportunity by unauthorized proceedings to deprive the legal officer of his salary, and bestow it upon a favorite.

We are aware that courts of high authority have sustained the doctrine contended for by the defendant. The doctrine of the court of appeals of New York now seems to be that a payment of the salary by the city to the officer *de facto* before the title to the office is determined is a good defense to a claim by the legal officer; but that the legal officer may recover all of the salary not in fact paid before the right to the office is determined, although it accrued before the determination of the title. We do not find that that court has noticed the element of notice to the city by the legal officer of his claim before payment. Courts in some other states have followed the New York doctrine. Courts of high authority in several of the states have held that the officer having a legal title to the office may recover of the city the salary, notwithstanding it has been paid to the officer *de facto*. We have not attempted to analyze the cases and to try to reconcile them. They appear irreconcilable. Our court is uncommitted, and we have come to the conclusion which seems to us best supported by reason and sound legal principles.

There is another question involved in the case, although not before us on the exceptions, arising on the special finding of the jury of the amount earned by the plaintiff by his personal labor during the time involved. It is claimed that the de-

ferdant has the right to recoup and have that amount deducted from the salary. The right of recoupment exists when the plaintiff claims damages for the breach of a contract; and then the sum to be recouped must arise out of the contract or the execution of it. The right to a salary fixed by law is not by contract. It is by statute, and unless there is some inhibition of the power, the tribunal establishing it may change it at pleasure: *Farwell v. Rockland*, 62 Me. 301. This precise question was settled in *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835.

The result is that the plaintiff is entitled to recover his salary as claimed, with interest from the time of demand.

Exceptions sustained.

THE CASES INVOLVING THE RIGHT OF AN OFFICER DE JURE TO HIS SALARY, when the office is in possession of an officer *de facto*, are incapable of reconciliation. If, during the incumbency of an officer *de facto*, and before any judgment of ouster has been rendered against him, the city or county of which he is such officer *de facto* pays him the salary of the office, a very decided preponderance of authorities sustains the position that by means of such payments the right of the officer *de jure* to collect his salary from such city or county is lost: *Auditors of Wayne County v. Benoit*, 20 Mich. 176; 4 Am. Rep. 382; *Shaw v. County of Pima*, Arizona, 1888; *State v. Clark*, 52 Mo. 508; *Smith v. Mayor of New York*, 37 N. Y. 518; *Westberg v. City of Kansas*, 64 Mo. 493; *McVeany v. Mayor*, 80 N. Y. 185; 36 Am. Rep. 700; *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *Steubenville v. Culp*, 38 Ohio St. 23; *Shannon v. Portsmouth*, 58 N. H. 183. This rule has been applied even when it was known that the officer *de facto* to whom the payment was made was insolvent, and that his title to the office was being contested by the officer *de jure*: *Commissioners of Saline County v. Anderson*, 20 Kan. 298; 27 Am. Rep. 171.

These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that his right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession, nor to question the title in any other way than by a proceeding in *quo warranto*. It is believed that none of these grounds are well taken, and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist.

In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that although he may faithfully discharge its duties, he cannot maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*: *McCue v. Wapello County*, 56 Iowa, 698; 41 Am. Rep. 134; *Matthews v. Supervisors of Copiah County*, 53 Miss. 715; 24 Am. Rep. 715; *Dolan v. Mayor*, 68 N. Y. 274; 36 Am. Rep. 168. In the next place, if he has in fact received the emoluments of the office, he has no right whatever to retain them, and he

may be compelled to account therefor to the officer *de jure*, in any appropriate form of action: *Douglas v. State*, 31 Ind. 429; *Lawler v. Alton*, 8 Ind. 160; *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; *Auditors of Wayne County v. Benoit*, 20 Mich. 176; 4 Am. Rep. 382; *Rull v. Tait*, 38 Kan. 765; *Beer v. Gorrell*, 30 W. Va. 95; *Glasscock v. Lyons*, 20 Ind. 1; *People v. Miller*, 24 Mich. 458; *Hunter v. Chandler*, 45 Mo. 452; *United States v. Addison*, 6 Wall. 291; *State v. Tate*, 74 N. C. 131. If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county, notwithstanding such payment: *McVeany v. Mayor of New York*, 80 N. Y. 185; 35 Am. Rep. 700. If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof: *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *Comstock v. Grand Rapids*, 40 Mich. 397.

If it is true, as must be admitted, that an officer *de jure*, though he performs none of the duties of the office, may maintain an action against the officer *de facto* for fees or salary actually collected by him, or against the city or county, for salary accruing during the incumbency of the officer *de facto*, but not in fact paid to him, then it must be that the officer *de jure* has some property rights in the emoluments of the office, and that these rights are not dependent upon his performance of its duties, but upon his title to the office, and it is difficult to understand how the wrongful payment of his salary to a person not entitled to receive it can, in any respect, impair his right to recover it, as though no payment whatever had been made. Hence the principal case, and cases in California and Tennessee, maintain the doctrine against the weight of authority, but in harmony, we think, with judicial principles, that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county, or other public body charged with the duty of making its payment: *Memphis v. Woodward*, 12 Heisk. 499; 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea, 46; *Dorsey v. Smith*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Id. 193.

The supreme court of Oregon has, however, decided that in no event can an officer *de jure* maintain an action to recover his salary while the office is in possession of an officer *de facto* whose right to the office has not been finally determined by an action brought expressly for that purpose: *Selby v. Portland*, 14 Or. 243. And in New Jersey an officer *de jure* cannot recover from an officer *de facto* the emoluments of office received by the latter while in discharge of its duties in good faith, and in the belief that he was entitled to the office and its emoluments: *Stuhr v. Curran*, 44 N. J. L. 181; 43 Am. Rep. 353.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

BOTTS *v.* GOOCH.

[97 MISSOURI, 88.]

MARRIED WOMEN — SEPARATE ESTATE. — At common law, marriage vests in the husband the personal property of the wife then owned or thereafter acquired by her, and of which he obtains possession, but in equity she has a separate existence from her husband, and may have possession and ownership of property separate from him.

HUSBAND AND WIFE. — **GIFT FROM HUSBAND** directly to his wife will, in many cases, be upheld in equity, and the same result follows the gift from a third person, where the husband assents and treats the property as belonging exclusively to the wife.

MARRIED WOMEN — SEPARATE ESTATE. — Where a married woman has received personal property from her father prior to the enactment of the Missouri married woman's act of 1875, and has always managed it as her own, and purchased other property with it in her own name with the consent of her husband, such property with its proceeds is her separate estate, and not liable for the debts of her husband, though he is insolvent.

A. W. Mullins, for the plaintiffs in error.

L. T. Collier, for the defendant in error.

BLACK, J. The plaintiff, Seth Botts, recovered a judgment against the defendant Joseph Gooch, in 1873, for \$1,086, and in the latter part of 1882 he purchased, at a sale under an execution issued on the judgment, a lot in Meadville and two forty-acre tracts of land. The title to this property was in the defendant Nancy Gooch, who is the wife of defendant Joseph Gooch. It is alleged that the property was purchased and paid for by Joseph, and that he had the same

conveyed to his wife to defraud his creditors. The prayer of the petition is, that the title be invested in the plaintiff. The defense is, that the property was purchased by Mrs. Gooch with her own means and property.

Defendants were married in 1869, and the proof is conclusive that Mrs. Gooch, at the time of her marriage, received from her father, as a gift from him, a mare, a cow, two steers, and some household furniture. She kept the mare and raised five colts, which she sold at fair prices. In 1880, she purchased one of the forty-acre tracts from Patterson for \$410. One third of this amount was paid in cash by her, and for the balance she and her husband made a deed of trust on the land. In 1881, she bought the other forty acres from the railroad company for \$411.20. She paid \$250 from the proceeds of the sale of her mare and two colts, and the balance of the money she borrowed from friends and relatives on her individual notes.

In 1882, she acquired the lot in Meadville by trading therefor a parcel of land for which she had given a horse valued at eighty dollars. This trade was negotiated for her by her brother, Mr. Evans. In 1881, she and her husband made a deed of trust on the two forty-acre tracts to secure seven hundred dollars, and the proceeds of this loan were used by her in paying off the Patterson debt on one forty-acre tract, and in paying the money which she had borrowed by her own notes in the purchase of the railroad forty acres. This seven-hundred-dollar debt is still unpaid, save the interest thereon.

There is some conflict in the evidence, but the foregoing facts are well established; and they show that the payments made on these parcels of land have all been made out of proceeds arising from sales and trades of the personal property given to her by her father at her marriage. The case is free from any fraud on her part. But the chief contention is, that as she received this property from her father prior to the married woman's act of 1875, it at once became the absolute property of her husband, and hence that the land was paid for by his money and property.

By the common law, the marriage vests in the husband the personal property of the wife then owned or thereafter acquired by her, and of which he obtains possession; and in general her possession is his possession. But according to the doctrine of courts of equity, she has a separate existence from her husband, and having such separate existence, she may

have the possession and ownership of property separate from her husband. Hence it is that gifts from the husband directly to the wife will, in many cases, be upheld in equity.

It was said in *Welch's Adm'r v. Welch*, 63 Mo. 57: "If, under certain circumstances, the gift from a husband to his wife will be upheld, it is not perceived why the same result will not follow when the gift emanates from a third person, when the husband assents to it and treats the property as belonging exclusively to the wife." In that case, there was no technical separate estate in the wife. During the marriage she had in her possession the proceeds of the sale of a horse which had been given to her. She also had a cow, which was a gift to her from her son. She sold the cow, and loaned the money to the defendant there, all with the knowledge and consent of her husband. It was held that the note which she took for the cow and money loaned belonged to her, and not her husband's estate. And in the more recent case of *Clark v. Clark*, 86 Mo. 114, 116, it is held that the husband may waive his right as such to his wife's personal property, and he may permit her to retain her money and property, and thereby free her property from his marital claims. To the same effect is *McCoy v. Hyatt*, 80 Id. 130.

In this case, Mrs. Gooch received the personal property from her father in 1869, and the evidence is clear and shows affirmatively that she has always managed it as her own, and with it purchased other property in her own name, and that she has done this with the consent of her husband. Under these circumstances, the property and proceeds arising from the sale thereof remained and continued to be her property, and not that of her husband. It results that the land in suit is also her property, and is not liable for the sole debts of her husband. That Mr. Gooch is insolvent is conceded, but that is a matter of no consequence, since the gift was not from him, but from a third person: *Holthaus v. Hornbottle*, 60 Mo. 439.

The judgment is reversed, and the bill dismissed.

All concur.

MARRIED WOMEN — SEPARATE PROPERTY. — The wife had no separate interest in chattels at the common law; but her property, like her person, was under the husband's control: *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; but married women could, in equity, hold a separate estate through the instrumentality of a trustee: *Id.* Separate estates and their incidents were originally creations of the courts of equity: *MacLay v. Love*, 25 Cal. 367; 85 Am. Dec. 133; and in equity a married woman is regarded as a *feme*

sole in respect to her separate estate, and may dispose of it as she pleases: *Smith v. Thompson*, 2 McAr. 291; 29 Am. Rep. 621; *Kimm v. Weippert*, 46 Mo. 532; 2 Am. Rep. 541; *Hollis v. Francois*, 5 Tex. 195; 51 Am. Dec. 760.

WISCONSIN STATUTE DEFINING RIGHTS OF MARRIED WOMEN OVER THEIR SEPARATE ESTATES does not apply to real estate derived from their husbands, but only to that derived from third persons: *Pike v. Miles*, 23 Wis. 164; 99 Am. Dec. 148. For a general discussion of the control of married women over their separate estates, see monographic note to *Harris v. Harris*, 53 Id. 399-401. State statutes affecting the separate estate of married women, see monographic note to *Kirkpatrick v. Buford*, 76 Id. 366-401. Power of married women to contract, under the American statutes, including contracts between husband and wife, see monographic note to *Kantrowitz v. Prather*, 99 Id. 599-610. Conveyances by husband and wife to each other, see note to *Turner v. Shaw*, 9 Am. St. Rep. 323-325.

STATE v. HERRELL.

[97 MISSOURI, 105.]

CRIMINAL LAW — MURDER. — Indictment for murder which fails to charge that the homicidal act was done feloniously is defective, and the defect is not cured by alleging that the assault was made feloniously, nor by the concluding words of the indictment that defendant did "feloniously kill and murder," when the words "feloniously," etc., are not connected with the mortal stroke by the words "then and there."

CRIMINAL LAW — MURDER — SELF-DEFENSE. — Where a party brings on a difficulty with the purpose of wreaking his malice by slaying his adversary, or doing him some great bodily harm, and actuated by such felonious purpose he does the killing, he is guilty of murder, and not entitled to the defense of self-defense.

CRIMINAL LAW — MURDER. — Instruction to the effect that the quality of the homicidal act is the same whether it was perpetrated with or without felonious intent, provided the perpetrator "brought on the difficulty or voluntarily entered into the same," is erroneous.

CRIMINAL LAW — MURDER. — Instruction which in effect holds that an intentional killing which may only be murder in the second degree is murder in the first degree is erroneous.

CRIMINAL LAW — MURDER — ADULTERY NO DEFENSE. — Where adulterous intercourse has taken place for a long series of years with the full knowledge of a son, who slays his mother's paramour in revenge, the adultery is no justification.

O. H. Travers, for the appellant.

B. G. Boone, attorney-general, for the state.

SHERWOOD, J. The indictment in this cause is as follows: "The grand jurors of the state of Missouri, chosen and selected from the body of Taney County, in said state of Missouri, who, after being duly impaneled, charged, and sworn, upon their oath find and present that Newton W. Herrell,

late of the county and state of Missouri, did, on or about the seventh day of October, A. D. 1884, at said county of Taney, and state aforesaid, in and upon one Amos Ring, then and there being unlawfully, willfully, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, make an assault, and with a certain pistol commonly called a revolver, then and there being loaded and charged with gunpowder and leaden bullets, and which said pistol was then and there held in the right hand of him, the said Newton W. Herrell, at, to, and against, and in and upon him, the said Amos Ring, did unlawfully, willfully, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, shoot off and discharge, and by means and force of the gunpowder and leaden balls aforesaid, did give to him, the said Amos Ring, two wounds, which said wounds were then and there mortal wounds, one of said wounds being on the left side of the body of him, the said Amos Ring, near the fifth rib, penetrating and entering the body of him, the said Amos Ring, near said fifth rib, said wound being of the depth of six inches, and width of one half inch, and the other said mortal wound being on the top of the head of him, the said Amos Ring, and said wound being then and there a mortal wound, being in depth about six inches, and width of one half inch, of which said mortal wounds he, the said Amos Ring, did then and there, on said seventh day of October, 1884, at the county of Taney and state of Missouri, instantly die. And so the grand jurors aforesaid do say that the said Newton Herrell, the said Amos Ring, in manner and form, and by the means aforesaid, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder, against the peace and dignity of the state of Missouri."

Under this indictment the defendant was tried, convicted of murder in the second degree, and his punishment assessed at fifteen years in the penitentiary; judgment accordingly, from which judgment defendant appeals. Various errors are assigned for a reversal of the judgment, among them the refusal of the court below to hold the indictment insufficient on motion to quash and on motion in arrest.

1. The indictment was insufficient in that it failed to charge that the homicidal act itself was done feloniously, etc. The failure thus to charge was not supplied by the allegation that the assault was made feloniously, nor by the concluding words of the indictment, nor by anything else therein con-

tained. This position is abundantly sustained by authority: *State v. Feaster*, 25 Mo. 324; *Respublica v. Honeyman*, 2 Dall. 228; 5 Bac. Abr., tit. Indictment, G, p. 68; 2 Bishop's Crim. Proc., sec. 564. There are authorities, however, for holding that an indictment will be made good, notwithstanding it fails to allege that the wound was feloniously, etc., given, provided that the words "feloniously," etc., previously alleged, are connected with the mortal stroke by the words "and then and there"; for in such case the words "feloniously," etc., will run through the subsequent allegations, and thus connect them with the mortal stroke to which they are essential, as already seen: 1 East P. C. 346; 2 Hale P. C. 184; *State v. Lakey*, 65 Mo. 217; *State v. Steeley*, 65 Id. 218; 27 Am. Rep. 271; *State v. Sides*, 64 Mo. 383. In the present case, it will be observed that this has not been done, nor the necessary connecting words used.

2. Over the objections and exceptions of the defendant, a large number of instructions were given at the instance of the state,—thirty-one in all. How the minds of the jury were to be or were enlightened by such a mass of written matter it is impossible to tell. Three instructions properly drawn will embrace every idea which they contain, as well as the whole law of the case arising on the facts developed by the testimony.

3. The defendant relied on the theory and fact of self-defense, and his testimony tended to support his plea.

Instruction No. 16, in the longsome series, is the following: "But if you believe, from the testimony, that Herrell was at the time purposely seeking Ring in order to bring on and did voluntarily enter into and engage in a combat or fight with Ring, with the intent to shoot and kill or do Ring great bodily harm, then the law of self-defense does not arise in behalf of the defendant, and cannot excuse or justify him for killing Ring."

It declares the correct doctrine as announced by this court on former occasions: *State v. Hays*, 23 Mo. 287; *State v. Packwood*, 26 Id. 340; *State v. Partlow*, 90 Id. 608; 59 Am. Rep. 31; *State v. Berkley*, 92 Mo. 41; *State v. Gilmore*, 95 Id. 554; *State v. Parker*, 96 Id. 382. Those cases, as well as all carefully considered cases in other jurisdictions, and all the text-writers, recognize as sound and wholesome law the principle that if a man bring on a difficulty with the purpose of wreaking his malice by slaying his adversary, or doing him some great bodily harm, and, actuated by such a felonious purpose, he

does the homicidal act, then there is no self-defense in the case, and he is guilty of murder in the first degree, and nothing less.

The eighth instruction was as follows: "The court instructs the jury that if you believe, from the evidence in this case, that the defendant sought or invited the difficulty in which Ring was killed, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily and of his own free will engaged in it, then and in that case you are not authorized to acquit him on the ground of self-defense. The right of self-defense does not avail as a defense in any case where the difficulty is sought for and induced by the party by any willful act of his own, or where he voluntarily and of his own free will enters into it."

This instruction is erroneous, in that it cuts off the defendant from a limited or qualified right of self-defense, though actuated by no felonious intent, provided he "brought on the difficulty," and is condemned by the authorities before cited. Indeed, a more monstrous proposition never found lodgment in print than that the quality of the homicidal act is the same whether it was perpetrated with or without a felonious intent, provided the perpetrator "brought on the difficulty, or voluntarily entered into the same." The two instructions first quoted are, for the reasons given, in irreconcilable conflict, and it cannot be told which one the jury took for their guide in arriving at their verdict: *Gay v. Gillilan*, 92 Mo. 250; *State v. McNally*, 87 Id. 644; *State v. Simms*, 68 Id. 305; *State v. Mitchell*, 64 Id. 191; *Frederick v. Allgaier*, 88 Id. 598; *Thomas v. Babb*, 45 Id. 384.

4. Besides, there is no testimony that the defendant began the quarrel, and so the only effect of the instructions mentioned was to confuse and mislead the jury: *State v. Chambers*, 87 Mo. 406. Prosecuting attorneys throughout the state seem to regard an instruction containing the words "brought on the difficulty" as applicable to every case of homicide. Such an instruction seems to be their stock in trade, their *vade mecum*, to be indiscriminately applied in any and every case where death is the result of violence.

5. The sixth instruction is in these words: "He who willfully, that is, intentionally, uses upon another, at some vital part, a deadly weapon, as a loaded revolver or a fire-arm, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and knowing this,

must be presumed to intend the death which is the probable and ordinary consequence of such an act. And if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly, or from a bad heart. If, therefore, you believe that the defendant took the life of Amos Ring by shooting him in a vital part with a revolver or pistol loaded with powder and leaden ball, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing was murder in the first degree."

This instruction, so far as it goes, was taken from an instruction of the same number in *State v. Talbott*, 73 Mo. 347; but the remainder of that instruction in that case was as follows: "And while it devolves on the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree."

The instruction in this case, mutilated as it was by lopping off the material portion already set forth, was erroneous, in holding, as it does in effect, that an intentional killing, which, under numerous decisions of this court, is only murder in the second degree, was murder in the first degree. The instruction taken as a whole, as given in Talbott's case, is sufficiently clear, though not drawn in a very happy manner, but as given in the case at bar, plainly erroneous: *State v. Sharp*, 71 Mo. 218, and cases cited.

6. The testimony disclosed by the record shows that when the defendant was some five years of age, his mother, Mrs. Herrell, and a little sister, left Tennessee in 1867, and came to Missouri with the deceased, and that Mrs. Herrell had been living in adultery with deceased until about six months prior to the homicide, when deceased was indicted for thus living in adultery, and it seems was fined fifty dollars as a punishment therefor. All this testimony as to the deceased having lived in adultery with defendant's mother was wholly outside of the case, and constituted no palliation or mitigation of defendant's guilt of the homicide, and should not have been admitted.

After adulterous intercourse has taken place for a long series of years, and a husband is fully cognizant of it, if he slay the paramour in revenge, the adultery constitutes no justification: *Sawyer v. State*, 35 Ind. 80, and cases cited. A like rule would certainly hold as regards a son being the avenger of his mother's honor, when equally well acquainted with similar facts.

For the errors aforesaid, the judgment should be reversed and the cause remanded.

INDICTMENT. — AN INDICTMENT FOR MURDER charging that the murder was committed feloniously, willfully, and of malice aforethought, is sufficient under the Texas code: *Wall v. State*, 18 Tex. 682; 70 Am. Dec. 302. "Feloniously and of malice aforethought," in an indictment charging "that A feloniously, and of his malice aforethought, assaulted B, and with his sword, etc., then and there struck him, etc.," apply not only to the assault, but also refer to the stroke, to which it is essential, in order to make the indictment sufficient: *State v. Owen*, 1 Murph. 452; 4 Am. Dec. 571. An indictment for a common-law felony should charge that the act was done feloniously or with a felonious intent, and the use of no other words will supply the omission of such an allegation; e. g., an indictment for murder not alleging that the killing was done feloniously is not sufficient, and a demurrer thereto should be sustained: *Kallin v. Commonwealth*, 84 Ky. 354. But an indictment charging that defendant unlawfully, feloniously, willfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient: *Redus v. People*, 10 Col. 208.

SUFFICIENCY OF INDICTMENTS FOR MURDER — CERTAINTY REQUIRED: See monographic note to *Schaffer v. State*, 3 Am. St. Rep. 279-284.

SELF-DEFENSE. — THE PLEA OF SELF-DEFENSE CANNOT BE SUSTAINED where the party shows himself the aggressor, and that he made the attack, or that he acted in retaliation: *People v. McLeod*, 1 Hill, 377; 25 Wend. 483; 37 Am. Dec. 328. A prisoner cannot avail himself of the plea of self-defense, where, pursuant to an expressed intent to kill, he goes to a place where he expects to meet the deceased, and there kills him in the manner and at the time mentioned in his previous threat, notwithstanding the deceased gave the prisoner legal provocation just before the killing, unless the prisoner can show that he had abandoned his intention to kill the deceased: *State v. Johnson*, 2 Jones, 247; 64 Am. Dec. 582. Nor can a prisoner plead self-defense where he sought deceased with a view to provoke a difficulty or bring on a quarrel, in which he afterwards kills the deceased: *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417; *State v. Rogers*, 18 Kan. 78; 26 Am. Rep. 754. One who brings on a difficulty for the purpose and with the intent to kill another, or do him great bodily harm, and who does in the progress of the quarrel actually kill the other, cannot avail himself of the doctrine of self-defense: *State v. Gilmore*, 95 Mo. 554; *State v. Parker*, 96 Id. 382.

MURDER — JUSTIFICATION. — Knowledge or belief of adulterous intercourse between the prisoner's wife and the deceased will not mitigate a crime from murder to manslaughter, and to extenuate the offense, which otherwise would be murder, the husband must actually know and himself find the deceased in the very act of adultery with his wife, and a mere belief that such

is the case will not suffice: *State v. John*, 5 Jones, 163; 49 Am. Dec. 396. And even when a husband finds his wife in the act of adultery, and strikes her with the intent to kill, it is murder. But if the blow was dealt in the heat of passion, and without intent to inflict death, it is manslaughter only: *Shufelin v. People*, 62 N. Y. 229; 20 Am. Rep. 483. Homicide is not justified by the prisoner's belief that the deceased had administered drugs to defendant's sister for the purpose of effecting her seduction: *People v. Cook*, 39 Mich. 236; 33 Am. Rep. 380.

PARKS v. PEOPLE'S BANK.

[97 MISSOURI, 180.]

[INJUNCTION WILL LIE TO RESTRAIN an execution sale of land where the equitable title is in a purchaser from the judgment debtor by payment of the purchase price under contract of sale made prior to the judgment, and where a deed has been made and recorded prior to such sale. Such remedy exists even if the judgment creditor was ignorant of plaintiff's rights before judgment was entered, if the former has not been misled to his prejudice, and laches has not intervened, and it exists because an innocent purchaser at such sale would acquire the legal title.

[CREDITOR BY OBTAINING JUDGMENT acquires no estate in the debtor's land, but a deed made before such judgment, and recorded before sale thereunder, is notice to a purchaser thereat, and will defeat him.

Joseph T. Tatum, and Thomas and Horine, for the appellants.

J. J. Williams, for the respondent.

BARCLAY, J. This is a proceeding in equity for an injunction and general relief. The material facts in the petition are, that the defendant bank recovered a judgment against one William Parks; that plaintiffs, long before, had acquired from the latter the equitable title to certain lands by paying for them under a contract for their purchase and taking possession; that after the bank's judgment and levy on said lands under it, the execution debtor made deeds to plaintiffs in accordance with his prior contract; that the bank had caused the lands to be advertised by the sheriff for sale under its judgment and levy, and would have them sold and thus conveyed unless restrained, etc.

The answer is a general denial, supplemented by further averments that "the lien of said judgment attached to said land prior to the acquirement by plaintiffs of any legal interest or lien; that the bank is solvent; that before rendition of said judgment said William was the legal owner of said land, and any right or claim of plaintiffs thereto was entirely unknown to the bank; that said judgment was upon a promis-

sory note, executed by said William and others, purchased by the bank before maturity, with the information and belief that said William Parks had fee-simple in said land, unencumbered by any liens or claims, with reliance upon said belief; that the neglect and laches of the plaintiffs lulled said bank into said belief that the land was good for said note and judgment." It charges fraud upon the part of plaintiffs and William.

The reply puts in issue the new matter in the answer.

On a hearing, the court perpetually enjoined the sale of the interest and estate acquired by plaintiffs in said lands from the judgment debtor as above indicated. Defendants appealed to the St. Louis court of appeals, where the decree was affirmed, but the cause was certified here on a division of opinion.

1. It will be observed that when the judgment in favor of the bank was rendered, plaintiffs' title to the lands in question was equitable only. It depended on the contract of sale, payment of the price, and delivery of possession (as found by the circuit court), constituting a part performance that would justify a court of equity in perfecting the title in plaintiffs. But at the time of said judgment the apparent legal estate was in William Parks. So plaintiffs necessarily had to resort to equity for relief against the effect of the judgment lien which the bank was seeking to enforce by the execution sale in question.

Defendants' chief contention is, that the remedy sought is not available, plaintiffs having an adequate remedy at law. The "legal remedy" is said to consist in interposing an equitable defense to any action of ejectment that might be brought on the strength of the sheriff's deed under the judgment. Such defense, no doubt, could be interposed, but suppose no such action of ejectment were promptly begun? Plaintiffs' equitable estate and ownership antedated the judgment, but that fact did not appear in the public record of titles. The proof thereof rested on facts outside. A sheriff's deed under the judgment would, therefore, apparently carry the title as against the judgment debtor's deed recorded before the execution sale, but executed after the judgment. That consequence of the sale justified the exercise of the preventive jurisdiction of equity to avoid the casting of a cloud on plaintiffs' title.

There is some lack of harmony in the Missouri cases re-

garding the appropriate use of injunction to restrain execution sales. The decision of this case does not require a general review of them. We have no doubt that that remedy is applicable on the facts here disclosed.

2. On the merits, the circuit court found the facts as they have been stated above. The equitable title of plaintiffs being complete before the judgment, and supplemented by a deed of the legal title before the execution sale, the case was brought precisely within the facts of *Black v. Long*, 60 Mo. 181, and within the rule of *Davis v. Ownsby*, 14 Id. 170; 55 Am. Dec. 105. The latter decision declared that a creditor by obtaining judgment acquired thereby no estate in the debtor's lands, and that a valid deed made before such judgment, and recorded before the execution sale thereunder, would be notice to a purchaser thereat, and would defeat him. That construction of our laws regarding judgment liens and conveyances was made in 1851. It has been approved in many later cases. It has long since become a rule of property in Missouri. Hence we do not consider it necessary to re-examine it. We adhere to it without further discussion, and in deference to our desire for certainty and stability in the interpretation of our laws.

3. The new matter in the answer constituted no defense to the cause of action. It appears to suggest an estoppel, but the facts recited do not create one. No act of plaintiffs is charged which misled the bank to its prejudice, and the laches alleged is not such as amounts to a defense. The injunction imposed by the trial court only prohibited the sale of the equitable estate of plaintiffs in the land to which the apparent legal title was then in the judgment debtor. Thus limited, it was properly decreed on the facts disclosed. The cause was fairly tried, and no good reason for reversing the decree has been shown.

The judgment of the St. Louis court of appeals is affirmed.

PURCHASER FAILING TO RECORD HIS DEED until after a judgment has been recovered against his vendor, but who does record it prior to a sale under such judgment, can hold the property against the purchaser at such sale; for a creditor who obtains judgment against his debtor gains thereby a lien upon the debtor's estate which is good against any subsequent act of the debtor, but does not acquire any interest or estate in the property, and consequently his judgment does not affect a *bona fide* purchaser prior to the judgment: *Davis v. Ownsby*, 14 Mo. 170; 55 Am. Dec. 105, and cases cited in the note thereto 108.

INJUNCTION WILL NOT LIE TO RESTRAIN A SALE on execution of land which the judgment debtor has conveyed to the party petitioning for the injunction: *Carlin v. Hudson*, 21 Tex. 202; 62 Am. Dec. 521.

NOTICE. — One getting title through or under a judicial proceeding is chargeable with notice of whatever appears in the records: *Ware v. Houghton*, 41 Miss. 370; 93 Am. Dec. 258.

MASONIC MUTUAL BENEFIT SOCIETY v. LACKLAND.

[97 MISSOURI, 187.]

EVIDENCE — INSPECTION OF BOOKS. — Where evidence is the result of voluminous facts, or the inspection of many books and papers, the examination of which cannot conveniently take place in court, or where the witness has inspected the accounts of the parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay.

EVIDENCE. — GENERAL OBJECTION to the competency of an exhibit or tabulated statement which is the result of an examination made by an accountant, and from which he testifies as a memorandum, is worthless, because not specific.

EVIDENCE. — ERROR IN ADMITTING EVIDENCE against objection is cured by admitting the same evidence subsequently without objection.

Krum and Jonas, for the appellants.

A. C. Stewart, Boyle, Adams, and McKeighan, and S. B. Jones, for the respondent.

SHERWOOD, J. Action on the bond of Luke, who was secretary of the association, Gerard B. Allen and Edwin Harrison being his sureties. By way of avoidance of the bond, the defendant sureties pleaded that prior to its execution Luke had been a defaulter to the association; that this fact was well known to the executive committee and the officers of plaintiff; but that such knowledge was not communicated to said defendants, and they were allowed to become bondsmen in ignorance of such material and damaging facts. Issue was joined on this plea, and the cause was referred to Alexander Martin to try all of the issues. After hearing the testimony, he made his report and finding in favor of the plaintiff. This report was confirmed by the circuit court, resulting in a judgment in plaintiff's favor, and the defendants have appealed to this court.

About the fact of the defalcation upon which defendants were sought to be held liable, there was no real contest. The evidence seems fully to sustain the finding of the referee, that

prior to the giving of the bond in suit there was no misconduct on the part of the principal in the bond, or at least knowledge of it on the part of the association or its officers.

Objection was made to the accountant Spinney testifying as to his examination of the books and papers in the office of plaintiff. The books, packages of vouchers, etc., were present at the examination, and were used from time to time by counsel on both sides. There is no rule in the law of evidence better settled than that where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which cannot conveniently take place in court, or where a witness has inspected the accounts of the parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay: 1 Greenl. Ev., 14th ed., sec. 93, and cases cited. The case of *Ritchey v. Kinney*, 46 Mo. 298, does not militate against this view.

Besides, the exhibit or tabulated statement, this being the result of the examination made by the accountant, and from which he testified as memoranda, when offered in evidence, was only objected to in a general way as incompetent, etc. Such an objection was worthless, because not specific: *Margrave v. Ausmuss*, 51 Mo. 561.

Moreover, the witness was asked by counsel for plaintiff the following questions:—

“Q. Can you give the total amount collected according to these vouchers or memoranda and agents’ reports from May 15, 1879, to October 1, 1881? A. According to the vouchers, \$354,464.99.

“Q. What is the total amount collected as by the cash-book? A. \$348,634.60.

“Q. What is the difference? A. \$5,830.39.”

This is the amount found by the referee. These questions being asked and answered without objection from defendants’ counsel would have cured any supposed error, if error there had been, in the former part of Spinney’s examination.

Finding no error in the record, the judgment will be affirmed.

EVIDENCE. — OBJECTIONS TO EVIDENCE, to be of any avail, must be reasonably specific; it is not enough that the objection states that the evidence is incompetent, immaterial, or irrelevant, but the particular objection must be fairly stated: *Ohio etc. R’y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638,

and note 645; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612; *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503; *Rindskoff v. Malone*, 9 Iowa, 540; 74 Am. Dec. 367; *Cunningham v. Cochran*, 18 Ala. 479; 52 Am. Dec. 230; *Smoot v. Eslava*, 23 Ala. 659; 58 Am. Dec. 310; *Rabe v. Fyler*, 10 Smedes & M. 440; 48 Am. Dec. 763. And so it is that evidence offered as a whole may be rejected as a whole, if part only of it is legal, when the proper objection is made to it as a whole: *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773; *Smith v. Causey*, 28 Ala. 655; 65 Am. Dec. 372; *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374; *Morrison v. Whiteside*, 17 Md. 472; 79 Am. Dec. 661; *Folk v. Wilson*, 21 Md. 538; 82 Am. Dec. 599. But when a general objection to the whole of a witness's testimony as irrelevant is made, it must be disregarded, if any part of such testimony is legal: *St. Louis etc. R'y Co. v. Hendricks*, 48 Ark. 177; 3 Am. St. Rep. 220; and to the same effect substantially is *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; *McCartney v. Shepard*, 21 Mo. 573; 64 Am. Dec. 250; *Wilms v. White*, 26 Md. 380; 90 Am. Dec. 113. Where evidence is objected to *en masse*, and without specific reasons given for its exclusion, the supreme court will not review the action of the lower court in respect thereto: *Bogie v. Nolan*, 96 Mo. 85; and no objection to the admission of evidence will be considered on appeal, unless the particular ground of such objection was made known to the trial court: *Hughes v. Wheeler*, 76 Cal. 230.

HARMLESS ERROR. — A PARTY SUFFERS NO PREJUDICE from the exclusion of testimony which he is subsequently allowed to introduce, so far at least as the substance of it is concerned, without objection: *Redfield v. Redfield*, 75 Iowa, 435.

ACCOUNTS AND ACCOUNT-BOOKS. — The question of the admissibility of books of accounts as evidence is considered in note to *Union Bank v. Knapp*, 15 Am. Dec. 191-198; *Oberg v. Breen*, 50 N. J. L. 145; 7 Am. St. Rep. 779, and note 780; *Miller v. Shay*, 145 Mass. 162; 1 Am. St. Rep. 449, and note 451.

LEAHEY v. CASS AVENUE AND FAIR GROUNDS RAILWAY COMPANY.

[97 MISSOURI, 165.]

EVIDENCE. — **DECLARATION, TO BE PART OF THE RES GESTÆ**, need not be coincident in point of time with the main fact to be proved. It is sufficient, if the two are so nearly connected that the declaration can, in the ordinary course of events, be said to be the spontaneous exclamation of the real cause, or if a subsequent declaration and the main fact at issue, taken together, form a continuous transaction, the declaration is admissible; but a mere subsequent declaration is not of itself a sufficient connecting circumstance to make it admissible.

EVIDENCE. — **DECLARATIONS OF PARTY INJURED BY RAILWAY TRAIN** as to how he received the injury, made when he was first picked up at the scene of the accident, surrounded by parties who witnessed it, are admissible as part of the *res gestæ*, but his declarations made from five to twenty minutes afterwards, when he had been removed fifty or seventy-five feet and placed on a cot, are inadmissible.

EVIDENCE — *RES GESTÆ*. — In action for damages for injury caused by a railway, evidence that immediately after the accident a woman was heard to shout "Murder" is inadmissible as part of the *res gestæ*.

WITNESS — IMPEACHMENT. — Credit of witness may be impeached by showing, after laying the proper foundation, that he has made statements out of court inconsistent with those made in court.

Leonard Wilcox, for the appellant.

J. F. Merryman, for the respondent.

BLACK, J. This is an action to recover statutory damages for the death of James O'Neil, a boy eleven years of age, and the son of the plaintiff. The defendant corporation owns, and with horse-power operates, a street-railroad in the city of St. Louis. That the boy was run over by one of defendant's cars, and received wounds and bruises from which he died on the next day, is an undisputed fact. At the time of the accident the car was a few yards east of the Twenty-fourth Street crossing, going east on Cass Avenue.

Plaintiff produced evidence tending to show that the boy was standing on the front platform of the car with the driver just before and while crossing Twenty-fourth Street; that they appeared to be talking together, and the driver appeared to be angry; that the boy opened the gate, and stepped out backwards on the step, facing and looking at the driver, and appeared to be frightened, and that he stepped and fell off and under the car. One witness says the driver made a pass at the boy with his hand.

The defendant's evidence tends to show that this and another boy by the name of Brown were together on the street; that Brown jumped on the step to the front platform, and, in answer to a question of the driver, said he was going down town, whereupon the driver told him to get in the car; that Brown opened the gate, stepped in on the platform, and then out and off; that at this moment O'Neil got on the step, and immediately slipped and fell under the car; that the driver did not speak to him, and only observed his presence when he fell.

Two policemen arrested the driver and conductor, and took them to the station. Persons present then carried the boy to the house of Mr. Keating, a distance of fifty or seventy-five feet, where a cot was provided for him. After he had been placed upon it, he stated to Mr. Keating, in answer to questions as to where he lived and how he got hurt, that he got on the step of the car, and the driver kicked him off. These

statements were made five or eight minutes after the accident. Dr. Miller arrived within fifteen or twenty minutes, and he interrogated the boy as to how he got hurt, and in answer the boy said he was on the front platform of the car, that he attempted to get off, and the driver kicked him off, and he fell under the car. These statements were detailed in evidence by Mr. Keating, his daughter, and Dr. Miller, and the question is, whether they are a part of the *res gestæ*.

In *Harriman v. Stowe*, 57 Mo. 93, the plaintiff was injured about noon. Her physician called between one and four o'clock of the same day, when she stated to him how she got hurt, namely, by falling through a trap-door. This statement the physician related on the witness-stand, and this court held the evidence competent, because part of the *res gestæ*, saying that the declaration and accident formed connecting circumstances. That case, it is urged by the plaintiff, goes far enough to admit the declarations made in the present case.

The case of *Brownell v. Railroad Co.*, 47 Mo. 240, was a suit instituted to recover damages for the death of the plaintiff's husband. There the declaration of Brownell, in reference to the switch, it is said, "grew directly out of and was made immediately after the happening of the fact"; and it was held that the declaration was competent evidence for the plaintiff.

That case cites with approval *Insurance Co. v. Moseley*, 8 Wall. 397, which was an action on a policy of insurance. To show that the death of the insured was caused by an accident, the wife testified that her husband left his bed between twelve and one o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself. The evidence of the son was to the same effect; he also testified further, that on the day after the fall his father said he felt badly, etc. This evidence was held to be competent for two purposes: 1. To show bodily injuries and pain; and 2. To prove that deceased fell down the stairs. In respect of the first, it is said, such evidence must relate to the present, and not to the past. Anything in the nature of narration must be excluded. As to the second, it is said in substance that generally the declarations must be contemporaneous with the event; yet the rule is not of universal application. Further on it is said: "Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured

almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress."

That court, as well as this, in the cases last cited, quote approvingly from *Hanover Railroad Co. v. Coyle*, 55 Pa. St. 396, where a peddler's wagon was struck and injured by a locomotive. The court said: "We cannot say that the declaration of the engineer was not a part of the *res gestæ*. It was made at the time,—in view of the goods strewn along the road by the breaking up of the boxes,—and seems to have grown directly out of and immediately after the happening of the fact."

Adams v. Railroad, 74 Mo. 553, was an action by the plaintiff to recover damages for the death of her husband. Plaintiff proved by one witness that after the deceased was struck, and after the train had stopped, two train-men, whom the witness took to be the fireman and engineer, came up, and one of them said to the other: "If you had stopped the train when I told you, you would not have killed him." The other replied: "It cannot be helped now; it is too late." This court, after reviewing various authorities, stated its conclusion as follows: "Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction, and illustrative of its character? or merely a subsequent narrative of how it occurred? or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury."

This case was cited as an authority in the subsequent case of *Devlin v. Railroad*, 87 Mo. 545, but that case was quite different in its facts, as will be seen from the following statement made therein: "It does not appear that these statements made by the section foreman to the foreman of the road-house were made while the foreman was transacting the business of the defendant."

Vicksburg and Meridian R. R. Co. v. O'Brien, 119 U. S. 99, was a personal damage suit. A witness was permitted to testify, that between ten and thirty minutes after the accident he had a conversation with the engineer in charge of the locomotive, and that he, the engineer, said the train was moving at the rate of eighteen miles per hour. The court held that this evidence should have been excluded, four of the justices dissenting. The majority opinion is put upon the ground that

the declaration did not accompany the act from which the injury arose, that it was a mere narration of a past occurrence, and therefore not a part of the *res gestæ*. The dissenting justices say: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in the presence of the injured parties, and while surrounded by excited passengers. . . . The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it."

Greenleaf says: "The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character": 1 Greenl. Ev., sec. 108.

Taylor says: "In all these cases the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction": 1 Taylor on Evidence, 7th ed., sec. 588. The same author, after speaking of the change in the old rule, where there are connecting circumstances, goes on to say: "Still, an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence, or of an isolated conversation held, or an isolated act done at a later period": Id. sec. 589.

These authorities show that there is still some diversity of opinion, both as to the rule and as to the application of a given rule. Care must be taken not to make the field of *res gestæ* too large or too contracted. The better reasoning is, that the declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous

transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance.

Applying these declarations to the present case, it is clear that what the boy said as to how he got under the car, when first picked up, was properly received as evidence of the cause of his injuries. He was then at the scene of the accident, surrounded by persons who witnessed the calamity, and his declarations then made were verbal acts, though made after the accident had happened.

But what he said after he had been removed to the house of Mr. Keating, after the persons connected with the accident had separated, and in answer to questions as to how he got hurt, should have been excluded. These answers were but narratives of what had transpired, made and intended as such. The time between the accident and making these declarations is short, it is true, but they are disconnected from the main fact. We do not understand any of the cases before cited to go far enough to admit these declarations, lest it be that of *Harriman v. Stowe*, 57 Mo. 93. It is to be observed that these statements made at the house of Mr. Keating were not offered for the purpose of showing that the boy was then suffering from the injuries, but for the purpose of showing the cause of the injuries. It was error to admit them in evidence.

2. Callahan, a policeman, testified: "I heard a cry on the sidewalk. I heard a lady shout 'Murder.'" This statement was repeated several times by this and another witness. Defendant's motion to strike out this evidence should have been sustained. The books report the case of the trial of Gordon for treason, where the cry of the mob who accompanied the prisoner on his enterprise was received in evidence. But in this case the woman had nothing to do with the accident. She saw the crowd that gathered around the car, and shouted "Murder." This, we understand, was after the accident. Her shouts shed no light whatever on the real issue: *State v. Brown*, 64 Mo. 371; *State v. Sneed*, 88 Id. 138.

3. Jessop, the driver, was a witness for defendant. For the purpose of impeaching the credit of this witness, it was competent to show that he had made statements out of court inconsistent with those made in court, the proper foundation

having been laid therefor, as was done in this case. The testimony of Officer Morgan was received for this purpose, and none other. The objection to it is without merit.

For the reasons before stated, the judgment is reversed, and the cause remanded for a new trial.

RES GESTÆ—DECLARATIONS.—Nothing is admissible as part of the *res gestæ*, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it: *Batton v. Watson*, 13 Ga. 63; 58 Am. Dec. 504; and generally, declarations must be contemporaneous with the main transaction to be admitted as *res gestæ*: *Crump v. United States M. Co.*, 7 Gratt. 352; 56 Am. Dec. 116; *Wetmore v. Mell*, 1 Ohio St. 26; 59 Am. Dec. 607; *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462; *Deming v. Carrington*, 12 Conn. 1; 30 Am. Dec. 591; *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 394, and note; *Bush v. Roberts*, 111 N. Y. 478; 7 Am. St. Rep. 741, and note; yet the declarations need not necessarily take place immediately with the occurrence of the main act, but may be before or after, provided they are calculated to unfold the nature and quality of the facts they are intended to explain, and so harmonize with them as to constitute one transaction: *McDowell v. Goldsmith*, 6 Md. 319; 61 Am. Dec. 305; and to the same effect, substantially, is *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49; compare also *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Ross v. Bank of Burlington*, 1 Aiken, 43; 15 Am. Dec. 664; *Reilley v. Haynes*, 38 Kan. 259, and note; *Lynch v. State*, 24 Tex. App. 350; 5 Am. St. Rep. 888, and note.

DECLARATIONS OF AN INJURED PARTY—RES GESTÆ.—Declarations of an injured person, made at the time of or just immediately after receiving the injury, as to how he was injured, etc., are admissible as *res gestæ*: *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Lane v. Bryant*, 9 Gray, 245; 69 Am. Dec. 282; *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. 487; 92 Am. Dec. 67; but plaintiff's mere narrative declarations of past events are inadmissible as evidence in his favor, though made to his attending physician: *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146; 82 Am. Dec. 621; *Chapin v. Marlborough*, 9 Gray, 244; 69 Am. Dec. 281; *Illinois Cent. R. R. Co. v. Sutton*, 42 Ill. 438; 92 Am. Dec. 81; *Central R. R. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31, and note 39.

DECLARATIONS, WHEN ADMISSIBLE IN EVIDENCE AS A PART OF THE RES GESTÆ.—This subject is fully discussed in a monographic note to *People v. Vernon*, 95 Am. Dec. 52-71.

IMPEACHING WITNESS.—The testimony of a witness may be impeached by proving the declarations of the party whose witness he was, that the witness had made statements contradictory to those made by him upon the stand: *Allen v. Harrison*, 30 Vt. 219; 73 Am. Dec. 302. And it is not error to allow a witness to be recalled and examined with a view to laying a foundation for impeaching his testimony in chief by proof of contradictory statements: *Scott v. Commonwealth*, 4 Met. (Ky.) 227; 83 Am. Dec. 461. Witnesses may be impeached by prior contradictory statements: *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; *Hedge v. Clapp*, 22 Conn. 262; 58 Am. Dec. 424; *Gould v. Norfolk Lead Co.*, 9 Cush. 338; 57 Am. Rep. 50; *Franklin Bank v. Pennsylvania etc. Nav. Co.*, 11 Gill & J. 28; 33 Am. Dec. 687; but the ground for impeachment must always be laid by calling witness's attention to the state-

ment, and the time and place when and where made: *Moore v. Bettis*, 11 Humph. 67; 53 Am. Dec. 771; *State v. Marler*, 2 Ala. 43; 36 Am. Dec. 398; *Sealy v. State*, 1 Ga. 213; 44 Am. Dec. 641; *Brown v. Calumet River R'y Co.*, 125 Ill. 665. Before a witness can be impeached by proof of contradictory statements, such statements must be called to his attention, and it is error to introduce them without having laid any foundation: *State v. Cleary*, 40 Kan. 287. Where an agent testifies in chief that he, and not the principal, is liable for the debt, it is allowable, on cross-examination, to ask him if, on a former occasion, giving time, place, and person, he had not said the principal ought to pay the debt: *Smith v. Watson*, 82 Va. 712. But it must be carefully borne in mind that no witness can be impeached by contradicting him upon mere collateral matters: *People v. Dye*, 75 Cal. 108.

BLODGETT v. PERRY.

[97 MISSOURI, 263.]

EXECUTIONS — RETURN. — Under the Missouri Revised Statutes of 1879, section 2338, an execution may issue returnable at the option of the plaintiff, either to the first or second term of court after such issuance.

EXECUTION — PRESUMPTION IN FAVOR OF OFFICER. — In the absence of proof to the contrary, it will be presumed that the clerk who issued and the sheriff who sold under the execution obeyed the dictates of duty, and complied with the law.

TO CONSTITUTE ESTOPPEL IN PAIS, there must be a false representation or concealment of known material facts made to a party ignorant of their truth or falsity, and made with intent that the latter party would act upon them, and he must have so acted upon them.

ESTOPPEL IN PAIS. — Mere silence or some act done where the means of knowledge are equally open to both parties does not create an estoppel *in pais*.

TO CREATE ESTOPPEL IN PAIS, it must be certain; the misrepresentation must be plain, not doubtful, nor a matter of mere inference or opinion.

ESTOPPEL IN PAIS. — Where a party acts under the advice of his counsel that a purchase under a second execution will be good, and that the sale to be made thereunder will bar and estop another from asserting title under any former deed to the latter, the latter is not estopped from setting up title.

ESTOPPEL. — An attorney's name signed to a petition merely as accommodation to plaintiff's attorney is not an estoppel as to the former from setting up title to land sold under execution issued in such suit.

EXECUTIONS — SALE — DEED. — An assignee of a purchaser of land at sheriff's sale without taking a deed cannot, after fifteen years have elapsed, begin suit against such ex-sheriff to compel him to execute to him a deed, without notice to a party also claiming title, and a deed so executed is void as to the latter.

SHERIFF'S DEED. — No title passes at sheriff's sale of land, except upon delivery of a deed.

EXECUTIONS — SALE — DEED. — Where a party, since deceased, purchased land at sheriff's sale, but took no deed, he has no interest that can be made the subject of administrator's sale.

EQUITABLE ESTOPPEL. — Stranger to title cannot invoke an equitable estoppel against plaintiff in ejectment.

EXECUTION — SALE. — Purchaser at sheriff's sale who allows fourteen years to elapse without taking a deed will be presumed, with those claiming under him, to have abandoned all claim to the premises.

H. S. Priest and S. P. Sparks, for the appellant.

Cockrell and Suddath, for the respondent.

SHERWOOD, J. Ejectment for certain land in Johnson County. Both parties claim title under Amos M. Perry, the former owner. Action brought January 22, 1885.

1. The agreed statement of facts shows that the Union Bank of Missouri was the creditor of Amos M. Perry, and the purchaser of his interest at execution sale; that the Union National Bank of St. Louis is the successor of the former bank as to all rights and interests, etc. The plaintiff claims under a quitclaim deed made by the latter bank to him October 22, 1884, and filed for record November 1, next thereafter.

The sheriff's deed to the Union bank is dated October 20, 1866, and filed for record October 22, 1870. To this deed objection is made that it shows that the special execution therein mentioned was issued September 5, 1865, delivered to the sheriff on the 15th of that month; but that no sale thereunder occurred till April 17, 1866, long after the return day of the writ, and that therefore the sale was void. To this objection it may be replied that under the law as it then stood and now is executions might have issued, and may issue, returnable at the option of the plaintiff, either to the first or the second term after such issuance: R. S. 1879, sec. 2338. And in the absence of aught to the contrary, it will be presumed that the clerk who issued and the sheriff who sold under the execution obeyed the dictates of duty and complied with the law. The indulgence of such presumption is of common occurrence, and of daily recognition in the courts: *Long v. Joplin M. & S. Co.*, 68 Mo. 422, and cases cited; *Addis v. Graham*, 88 Id. 197; *Hammond v. Gordon*, 93 Id. 223.

2. Now as to the plea of estoppel *in pais* or equitable estoppel as set forth in the answer: The gist of the plea is, that plaintiff was the attorney for the Union Bank in the attachment suit instituted by the bank against Amos M. Perry in 1870; that defendant claims under one Shumate, and has acquired all of Shumate's rights in the premises by proper conveyances; that Shumate, under the sale made by virtue of

the attachment proceedings aforesaid, bought the premises in controversy, relying upon the acts of the bank in attaching and selling under execution said property, as that of Amos M. Perry, as a declaration and admission of the bank that it was not, and Amos M. Perry was, the owner of said real estate, purchased the same, and paid therefor; and this defendant, as his assignee, has received a deed from the sheriff for said land; and that plaintiff had acquired his deed with notice, etc. This plea is plainly bad on its face. It does not contain within its allegations a single element of estoppel. It is not alleged that Shumate was misled by any act of the Union Bank or of plaintiff, or that he was in ignorance of the true state of the title, or that the former deed to the Union Bank was not put to record, or that the act of the Union Bank induced Shumate to buy the land which otherwise he would not have bought.

An eminent text-writer, treating of the subject of equitable estoppel, says: "The cases when carefully analyzed show that all the following elements must actually or presumably be present in order to an estoppel by conduct: 1. There must have been a false representation or a concealment of material facts; 2. The representation must have been made with knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; 5. The other party must have been induced to act upon it": Bigelow on Estoppel, 3d ed., 484.

In *Dezell v. Odell*, 3 Hill, 215, 38 Am. Dec. 628, Cowen, J., says: "We then have a very clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel *in pais*."

Nor will mere silence, or some act done, where the means of knowledge are equally open to both parties, estop the party doing the act or remaining silent. Thus in *Brinckerhoff v. Lansing*, 4 Johns. Ch. 64, 8 Am. Dec. 538, Lansing was a mortgagee, whose mortgage was duly recorded, and he witnessed a lease made by his mortgagor of a part of the mortgaged premises, and it was ruled by Chancellor Kent that no estoppel arose by reason of the fact of the registry of the mort-

gage, the lessee being charged with constructive notice of it. Similar rulings have been made elsewhere: *Odlin v. Gove*, 41 N. H. 465; 9 Am. Dec. 39; *Carter v. Champion*, 8 Conn. 549, 554; 21 Am. Dec. 695; *Bigelow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264. The same doctrine has been recognized by this court: *Bales v. Perry*, 52 Mo. 449, and cases cited; *Acton v. Dooley*, 74 Id. 74, and cases cited. Furthermore, there must be a certainty about the alleged estoppel; the misrepresentation must be plain, not doubtful, or matter of mere inference or opinion; for the courts will not suffer a man to be deprived of his property or security where he had no intention to part with it. It is much the same thing to say that the representation or conduct is such as would naturally lead to the action taken; that is, it should be such as to justify a prudent man to act upon it: *Bigelow on Estoppel*, 3d ed., 490, 491. Tested by these authorities, and the rule they enunciate, the plea was wholly worthless.

3. And the evidence to support the plea of estoppel is of a piece with it, since it is clear that Shumate was acting under and relying, not on the act of the bank in having the sale made, but upon the advice of his counsel, F. M. Cockrell, that his purchase under the second execution would be good, as the sale made thereunder would bar and estop the bank from asserting title under any former deed to the latter.

4. Nor is it seen that the case of the defendant is strengthened by the fact that the plaintiff's name is marked to the petition as counsel with Elliot and Land, since his uncontradicted testimony shows that he was not counsel for the bank, that Land was, and that plaintiff's name was signed merely as an accommodation to Land. Something has been said about plaintiff's agreeing to the sale in question; but there is not a *scintilla* of evidence tending to show this to be true, granting it to be material. That he was present at or near the sale is, indeed, testified to; that he was seen to converse with Land is also testified to; but that he agreed to the sale, or the terms upon which Shumate bought, no one swears.

5. Shumate died in 1875. Prior to his death, however, and prior to the execution sale to him, to wit, December 19, 1870, Amos M. Perry had conveyed by quitclaim to the defendant the premises in dispute. No deed was ever made to Shumate for the premises. About nine months after the present action was begun, however, and some fifteen years after Shumate's death, the defendant instituted in the Johnson circuit court a

decidedly unique proceeding, a proceeding wherein the said defendant appears as plaintiff, and the former sheriff as defendant, and wherein it is gravely recited that "due notice" of the motion was given to the defendant, i. e., to the former sheriff! Whereupon, after numerous recitals of facts, it was ordered by the court that said former sheriff execute a deed to the present defendant as assignee of Shumate. Of this proceeding, one without notice to plaintiff, a purely *ex parte* proceeding, it is scarcely necessary to say more than that there yet remains in this country a certain instrument, commonly called a constitution, which forbids a man to be passed upon, either in person or estate, without an opportunity to be heard. The deed, therefore, though made under the order of the court, passed no title to defendant as against plaintiff, and was as to him utterly worthless, saying nothing about the great laches exhibited by defendant, and those under whom he claims, in coming forward and asserting any right which it may be supposed was acquired by Shumate at the sheriff's sale; as to which point, see *Hoge v. Hubb*, 94 Mo. 489.

6. Furthermore, as no title to lands sold at sheriff's sale passes except upon delivery of the deed (*Leach v. Koenig*, 55 Mo. 451), Shumate had no such interest in the premises as could be the subject of administrator's sale, and consequently Crittenden and Cockrell took nothing by their purchase, and of course could transfer nothing to the defendant. And the deed of the former sheriff to the defendant was, as already seen, invalid as to the plaintiff. So that the defendant occupies the attitude of a stranger to the title attempting to invoke against the plaintiff an equitable estoppel,—something which cannot be done.

7. Moreover, the plaintiff bought of the successor of the Union Bank the premises in question about fourteen years after Shumate had bid in the land, but had failed to take a deed. From the great lapse of time without a deed having been taken, plaintiff might well conclude that Shumate and those claiming under him had abandoned all claim to the premises in litigation.

It follows from what has been said that a peremptory declaration of law in favor of plaintiff, as asked, should have been given. The judgment is reversed, and judgment will be entered in this court for plaintiff.

EXECUTIONS. — Every reasonable presumption will be indulged in favor of sustaining the ministerial acts of officers making judicial sales: *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701; *Childs v. McChesney*, 20 Iowa, 431; 89 Am. Dec. 545, and note 550; *Thomas v. Málcom*, 39 Ga. 328; 99 Am. Dec. 459, and note 461; *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note. Presumptions are constantly made in support of the official acts of public officers: *Hammond v. Gordon*, 93 Mo. 223.

PURCHASER AT AN EXECUTION SALE is not clothed with legal title until he has received the sheriff's deed, but only has a lien or equity in the purchased property: *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

GUMM v. HUBBARD.

[97 MISSOURI, 311.]

CONTESTED ELECTION — NOTICE. — Where in an election contest the ground upon which it is based does not touch the qualifications of the voters, it is not necessary to set out their names in the notice of contest; but it is sufficient to state the grounds of contest under section 5523, Revised Statutes of Missouri; and such notice need not state the facts which constitute ballots fraudulent, as section 5493 of such statutes furnishes an absolute rule of evidence in that regard.

ELECTION — FRAUDULENT BALLOT. — Where the county court has ordered a stock law submitted to the electors at a general election, their votes for or against it, written upon the ballots cast, does not render such ballots fraudulent under section 5493, Revised Statutes of Missouri, whether such order of the court was valid or not.

ELECTION — EVIDENCE TO EXPLAIN BALLOTS. — Effect should be given to the will of the electors, and circumstances surrounding an election may be given in evidence to explain ambiguities in the ballots. Therefore where, in an election contest, there were but two candidates for a county office, and their names are so unlike that there is no danger of confusion between them, while the voting population was largely German, the court is authorized to find that ballots cast for "J. D. Hubba," "J. D. Huba," "Huber," "J. D. Hub," and "D. Huber" should be counted for "J. D. Hubbard."

ELECTION — PRESUMPTION THAT BALLOT IS VALID. — Where an election is held, and the ballots received and counted by duly appointed officers, it is presumed that such ballots are legal, and the burden of proof is upon the party who asserts their invalidity to show that they are illegal.

ELECTION — PRESUMPTION THAT BALLOT IS LEGAL. — It is not sufficient proof of the invalidity of a vote to show that the person who cast it is of foreign birth, nor that he made declaration of his intention to become a citizen more than five years before the date of the election in question. The presumption that the ballot is legal is not overcome by such proof, without more.

ELECTION — CITIZEN — MINOR CHILD — NATURALIZATION OF PARENT. — The minor children of aliens, though born out of the United States, if dwelling therein at the time of the naturalization of the parents, thereby become citizens by virtue thereof.

CITIZENSHIP. — WHERE WIDOW AND HER MINOR SON, both of foreign birth, come to the United States, and the mother marries a citizen of the latter country, both she and her minor son are made citizens by such marriage.

ELECTION — ILLEGAL BALLOT. — A ballot cast by one of the judges of election after the polls have been closed is illegal.

ELECTION — PRACTICE. — The appellate court will not determine disputed or doubtful questions of fact in contested election cases; and if the judgment of the lower court is in accord with correct principles of law, it will be affirmed.

B. R. Richardson, R. F. Walker, A. L. Ross, D. E. Wray, A. W. Anthony, J. D. Bohling, and Draffen and Williams, for the appellant.

William S. Shirk, and Edwards and Davison, and Nelson and Spurlock, for the respondent.

BLACK, J. This is an election contest between Caleb Gumm and Joel D. Hubbard, who were candidates for the office of county clerk of Morgan County at the election held on the 2d of November, 1886. The official count gave Hubbard 1103 and Gumm 1096 votes, — a majority of seven for Hubbard. After Gumm gave notice of contest, Hubbard gave a like notice, and the circuit court gave judgment for Hubbard, the contestee.

1. Gumm, the contestant, objected to the introduction of any evidence in support of a part of contestee's notice. The court did not pass upon the question at the time, but took it under advisement until the close of the case, and the record does not show that any ruling was then made upon the objection. The objection, however, was not well taken. The part of the notice to which the objection was made states that at a designated precinct twelve persons, giving their names and the number of their ballots, voted for Gumm, and that the ballots were counted for him; "that each and all of said ballots had written upon them certain writing and written words other than the designations of the offices to be filled, and others that substituted names of persons voted for; wherefore said ballots were illegal and fraudulent, and should not have been counted." The same part of the notice goes on to make a like charge as to votes at other designated precincts, omitting, however, the names of the voters and numbers of the ballots.

Section 5493, Revised Statutes, provides: "Said ballot shall not bear upon it any device whatever, nor shall there be

any writing or printing thereon, except the names of persons, and the designations of the offices to be filled, leaving a margin on either side of the printed matter for substituting names. Each ballot may bear a plain written or printed caption thereon, expressing its political character, but on all such ballots the caption or head-lines shall not in any manner be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and the same shall not be counted." By section 5528, "the notice shall specify the grounds upon which the contestant intends to rely, and if any objection be made to the qualifications of any voters, the names of such voters and the objections shall be stated therein." Since this ground of contest does not go to the qualifications of the voters, it was not necessary to set out their names; it was sufficient to state the grounds of the contest.

The objection to the sufficiency of the notice is, that it does not appear from the facts stated that the ballots were fraudulent. It is not contended that the notice should set out the words which it is claimed render the ballots fraudulent, but it is insisted that there is not enough stated to show that the ballots were fraudulent. Section 5493 furnishes an absolute rule of evidence. It makes the ballot fraudulent, without regard to intent, when it has thereon any writing or printing other than that specified. It may have written or printed thereon the names of the persons voted for, words designating the offices to be filled, substituted names, and a caption expressing truly its political character; but it is fraudulent if it bears any other writing or printing. It is true, the notice does not, in express terms, state that the "writing and written words" were other than a caption or head-lines. But the notice conveys the idea that the ballots, besides being full and formal, had written thereon other and additional words. The notice might have been more specific, but it is to be remembered there are no formal pleadings in these cases. The notices, on the one side and the other, constitute the only pleadings. Section 5532, Revised Statutes, provides that "every court authorized to determine contested elections shall hear and determine the same in a summary manner, without any formal pleadings." The contestant did not present this question until he had put in his own evidence, and then not by way of a motion to strike out this part of the notice, but

by way of an objection to the introduction of any evidence. In view of all of the foregoing considerations, we are of the opinion that there would have been no error in overruling the objection thus made by the contestant.

We, however, agree with the contestant that the proof offered by the contestee furnished no reason for excluding the ballots. It shows that prior to the election the county court made an order submitting to the electors the question whether the stock law should be put in force. Many persons wrote upon their ballots words expressing their vote for or against the law, and these are the words which the contestee insists rendered the ballots fraudulent. Had the order of the county court been a valid one, then it is conceded that the vote for or against the stock law might have been written upon the general ballot; and so we held in *Applegate v. Egan*, 74 Mo. 259.

But the contestee insists that the order of the county court was void because it was made upon the petition of householders of five or six congressional townships, and not upon the petition of householders of five or more municipal townships. Let it be conceded that the act of March 31, 1885 (Acts of 1885, p. 29), when it speaks of five or more townships, means municipal and not congressional townships, and that the order of the county court was a void order; still it does not follow that these ballots were fraudulent. To say that they were fraudulent is to make section 5493 a snare to entrap the unsuspecting voter; that is not its purpose. The order for the vote was made by the court having power to make it on a proper petition; and so far as the balance of the ticket before the electors is concerned, it is wholly immaterial whether the order was void or valid. The voter was not, at the peril of losing his entire vote, called upon to investigate the validity of the order.

2. After this contest had been commenced, each party, at different dates, procured a writ under the act of March 27, 1883 (Acts of 1883, p. 91), commanding the clerk of the county court to open and recount the ballots. Both of these recounts gave Hubbard a majority of twelve. This increase is due to the fact that in the recounts one vote for "J. D. Huba," one for "J. D. Hubba," one for "Huber," one for "J. D. Hub," and one for "D. Huber" were counted for contestee. Effect should be given to the will of the electors, and it is now generally agreed that the circumstances surrounding the election may be given in evidence on an election contest, to explain

ambiguities in the ballots: McCrary on Elections, sec. 396; Cooley on Constitutional Limitations, 611; 6 Am. & Eng. Ency. of Law, 431. There were but two candidates for this office, and their names are so unlike that there is no danger of confusion as between them. The election, as to these candidates, was local, confined to the county where they resided, and the voting population seems to have been largely German. Under the evidence, the court might well have found that these ballots were for the contestee, and there would have been no error in counting them for him. Whether the court did or did not count them for him does not appear from this record.

3. Each party to this contest insists that the other received a large number of votes which should be excluded, because the persons casting them were not citizens of the United States, and had not declared their intentions to become citizens not less than one nor more than five years before the election in question. In looking at these questions of fact, it is to be remembered that this election was held by duly appointed officers who received and counted the votes to which objection is now made. The presumption is, that the votes were legal, and it devolves upon the party who asserts their invalidity to show that they are illegal. It is not sufficient proof of the invalidity of a vote to show that the person who cast it is of foreign birth, nor is it sufficient to show that he made declaration of his intention to become a citizen of the United States at a date more than five years before the date of the election in question. The presumption of innocence is not overcome by such proof, without more.

Again, the minor children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of the parents, become citizens by virtue of the naturalization of the parents: *State v. Andriano*, 92 Mo. 71. The record discloses a case where a widow and her son, both of foreign birth, came to the United States; and while the son was yet a minor, the mother married a citizen of the United States. Section 1994, Revised Statutes of the United States, declares that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." The marriage of the mother with a citizen made her a citizen, and her minor son became a citizen by operation of section 2172, Revised Statutes of the United States: *United States v. Kellar*, 11 Biss. 314.

Applying these rules to the evidence and the admissions made by the parties on the one side and the other, it appears that Hubbard received twenty-eight votes cast by persons who were not qualified voters by reason of alienage, and Gumm received nine such illegal votes. Hubbard received at least one, and Gumm seven other votes, which must be excluded, because the persons casting them were disqualified, either by reason of minority, or because not residents of the state one year, and of the county for sixty days preceding the election, or because they did not vote in the township where they resided. In the foregoing estimate of illegal votes cast for Gumm is included one vote of one of the judges of the election who did not cast it until long after the polls had been closed. The polls, when closed, are closed to the judges as well as to other persons.

4. The result of the foregoing consideration is that Gumm has a majority of one. But there are a dozen or more other votes to which objections are made on the ground of minority, want of citizenship, want of sufficient residence in the state or county; and the evidence is such that the court might well have found for either party. It is not the province of this court to determine disputed or doubtful questions of fact in these contested election cases any more than in other actions at law: *Turner v. Drake*, 71 Mo. 285. There are no specific findings, but simply a general finding for contestee. No instructions were asked or given on the trial, and we have said enough to show that the judgment is in accord with correct principles of law, and it is therefore affirmed.

EVIDENCE TO EXPLAIN AMBIGUITIES IN BALLOTS. — The true rule as to the admissibility of extrinsic evidence for the purpose of obtaining information of the intent of the voter when casting an imperfect ballot is undoubtedly correctly stated in the principal case, for the courts have quite generally held that where it is apparent from the ballot that the true intent of the elector is not perfectly expressed on its face, as when the person intended to be voted for is not certainly identified by it, then, to aid such imperfection, resort may be had to extrinsic evidence of the circumstances surrounding the election, and the facts of a general public nature connected with it, in order that these may be considered in connection with the ballot, in determining what was the intention of the elector. Judge Cooley, after an earnest, exhaustive, and searching review of the cases, thus expresses the rule: "We think evidence of such facts as may be called the circumstances surrounding the election, such as who were the candidates brought forth by the nominating conventions, whether other persons of the same names resided in the district from which the officer was to be chosen, and if so, if they were eligible, or had been named for the office, if a ballot was printed imperfectly, how it

came to be so printed, and the like, is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever, in which cases it is not admissible": Cooley on Constitutional Limitations, 611. Judge McCrary, in his treatise on elections, page 343, adopts Judge Cooley's rule, with the following qualification: "No harm can result from admitting such extrinsic evidence so long as it is only admitted to cure or explain such imperfections and ambiguities as could be cured if they occurred in the most solemn written instruments, and to this extent, and no further, would we carry it"; and when taken with the further qualification that the testimony of the elector cannot be received for the purpose of explaining that he voted a particular ballot, or that he intended to vote it for a particular candidate, the rule finds support under the decisions of every state in the Union except those in Michigan, and they will be noticed hereafter. Among those cases which may be consulted as discussing the question and adopting the above doctrine, are *Attorney-General v. Ely*, 4 Wis. 420; *State v. Griffey*, 5 Neb. 161; *People v. Ferguson*, 8 Cow. 102; *People v. Seaman*, 5 Denio, 409; *People v. Saxton*, 22 N. Y. 309; 78 Am. Dec. 191; *People v. Pease*, 27 N. Y. 45; *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250; *McKinnon v. People*, 110 Ill. 305; *State v. Goldthwaite*, 16 Wis. 152; *Clark v. Robinson*, 88 Ill. 498; *People v. Matteson*, 17 Id. 167; *State v. Gates*, 43 Conn. 533; *Clark v. Board of Examiners*, 126 Mass. 282-285; *Newton v. Newell*, 26 Minn. 529; *Clark v. Board of Commissioners*, 33 Kan. 202; 52 Am. Rep. 526. In relation to this question, it was said in *Clark v. Board of Examiners*, *supra*, that "upon a case of controverted election, brought before a legislative body vested with the power of determining the election returns and qualifications of its own members, or presented to a judicial tribunal by information in the nature of a *quo warranto* or other process to try the title to an office, evidence of extrinsic circumstances, such as that no other person of corresponding initials resided in the same city or county, or had been nominated by public convention or otherwise for the office in question, may be introduced, and may satisfy the tribunal having authority to receive and consider it that votes describing the christian name by a single letter were intended for the same person as votes setting forth at length a christian name having a corresponding initial."

But a board of examiners cannot receive or consider such extrinsic evidence: *Id.*; and therefore such board cannot return as votes for "William H. Smith" votes cast for "W. H. Smith," or "W. Smith": Opinion of the Justices, 64 Me. 596. But under the main rule stated above, votes cast for "F. Wimmer" were counted for "E. Wimmer," upon proof that the latter was the candidate for the office; that no other person by the first name was eligible to the office; that such name was printed on the ballots under the belief that it was the real candidate's name, and that the electors casting such ballots so believed: *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250, where the subject is discussed at length. Under identical circumstances, votes cast for "Joseph Malzacher" were counted for "Henry Malzacher," the true nominee: *McKinnon v. People*, 110 Ill. 305. In the same state, in *Talkington v. Turner*, 71 Id. 234, it was held that ballots cast for "Talkington" should have been, under the evidence, counted for "Joseph Talkington." So votes cast for "E. W. Robso," "Robertson," "W. E. Roberts," and "Robin," should be counted for "William E. Robinson," under the ruling in *Clark v. Robinson*, 88 Id. 498. In *Newton v. Newell*, 26 Minn. 540, in applying the facts to the

case, the court made a slight deviation from the general current of authority. The court, **Berry, J.**, said: "If for a certain office there is but one person running of a given name, say the name of 'Frank E. Newell,' a ballot for 'Newell' simply, without any christian name or initial thereof, will pass, and should be counted for 'Frank E. Newell,' and so should a ballot for 'Frank Newell,' or 'F. E. Newell,' or 'F. Newell.' So if to designate the person voted for, letters are used which do not properly spell the name 'Newell,' but do spell a word which is *idem sonans*, this should be counted. All these should be counted, for the reason that they designate the person intended to be voted for with reasonable certainty. But unless the ballot is one of these kinds, or of equivalent certainty, it should be rejected. Therefore a ballot for 'Nall,' or 'Null,' or 'Neden,' or 'W. Null,' should not be counted for 'Newell.' Neither should a ballot for 'New,' or 'Newt,' or 'Newto,' or 'Newn,' or 'Neto,' be counted for a candidate by the name of 'Newton.' 'Nuton' and 'Newten' may, however, be properly counted for such candidate."

In the early and well-considered case of *Attorney-General v. Ely*, 4 Wis. 438, votes cast for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter" were counted for "Matthew H. Carpenter," the nominee, upon proof that it was the intention of the electors to vote for him. So in *People v. Ferguson*, 8 Cow. 102, it was held that ballots cast for "H. F. Yates" should be counted for "Henry F. Yates," if, under the circumstances, the jury were of opinion that they were intended for him; and to arrive at that intention it was competent to prove that he generally signed his name "H. F. Yates"; that he had before held the same office for which these votes were cast, and was then a candidate again; that the people generally would apply the abbreviation to him, and that no other person was known in the county to whom it would apply. This ruling was followed in the subsequent cases of *People v. Seamen*, 5 Denio, 109, and *People v. Cook*, 8 N. Y. 67. And in *People v. McManus*, 34 Barb. 620, votes cast for "trustees of public schools" were counted for "trustees of common schools," as there were no trustees to be voted for at that election except trustees of common schools. And in *State v. Goldwaite*, 16 Wis. 152, ballots cast for "superintendent of schools" were counted for the party nominated for the office of "county superintendent of schools." And in *State v. Gates*, 43 Conn. 533, it was determined that votes cast at an election for "A. J. Willoughby" may be shown to have been cast for "A. L. Willoughby," by proof that the latter was a candidate; that no person of the first name with that middle initial resided in the district. The rule has been adhered to with such uniformity in contested election cases in Congress that it is deemed necessary to only give here the facts of a few of the cases, as the circumstances under which they arose seem to have been almost identical in each of the particular cases which will be hereafter cited.

In the case of *McKensie v. Braxton*, Smith's Cong. Elec. Cas. 19, it appears that ballots were deposited for "E. M. Braxton," "Elliott M. Braxton," "Elliott Braxton," and for "Braxton," for Congress. In their report to the house, which was adopted, the committee said: "The proof in this case clearly shows that the sitting member is known throughout the district as well by the name of 'E. M. Braxton' as by that of 'Elliott M. Braxton,' and that he is familiarly called 'Elliott Braxton'; also that there is no other person in the district, except the sitting member's infant son, who bears the name of 'Elliott M. Braxton,' 'E. M. Braxton,' or 'Elliott Braxton'; and that the sitting member was regularly nominated for Congress by the Democratic or Conservative convention of the district; that his letter of acceptance was signed

'E. M. Braxton'; that he canvassed the district, and was the only person by the name of Braxton who was a candidate. These facts are not disputed by contestant; but we are asked to throw out a large number of votes, unquestionably cast in good faith for the sitting member, upon the purely technical ground that his name was printed upon the ballots 'E. M. Braxton' or 'Elliott Braxton' instead of 'Elliott M. Braxton.' The grounds upon which the contestant makes this claim seem to be: 1. That we are not permitted to look beyond the ballot to ascertain the voters' intent; and 2. That the ballots in question cannot, upon their face, be held to have been intended for 'Elliott M. Braxton.' It may be, and doubtless is, sometimes necessary to sacrifice justice in a particular case in order to maintain an inflexible legal rule; but all just men must regret such necessity, and avoid it when possible to do so. Your committee are clearly of opinion that no such necessity exists here. So far from demanding such a sacrifice of right, the law as well as equity forbids it. The contestant asks the house to apply the strict rule which has sometimes, though not always, been held to govern canvassing boards, whose duty is purely ministerial, who have no discretionary powers, and can neither receive nor consider any evidence *aliunde* the ballots themselves. It is manifest that the house, with its large powers and wide discretion, should not be confined within any such narrow limits. The house possesses all the powers of a court having jurisdiction to try the question who was elected. It is not even limited to the powers of a court of law merely, but under the constitution, clearly possesses the functions of a court of equity also. If, therefore, it were conceded that the canvassers erred in counting for the sitting member the votes cast for 'E. M. Braxton' and 'Elliott Braxton,' it would not determine the question of what the house should do. What, then, is the true rule for the government of the house in determining what votes to count for the sitting member? Your committee are clearly of the opinion that where the ballots give the true initials of the candidate's name, that is sufficient; and we therefore, without hesitation, hold that the ballots given for 'E. M. Braxton' must be counted for the sitting member. Another objection, urged with more zeal by the contestant's counsel, is to the votes cast for 'Elliott Braxton.' These, it is urged, cannot be counted for the sitting member. Even if we were not permitted to look beyond the ballots themselves, we could have little doubt as to our duty; but under some circumstances, and for certain purposes, evidence outside the ballots themselves is admissible. It is true, no evidence *aliunde* can be received to contradict the ballot, or to give it a meaning, when it expresses no meaning of itself; but if it be ambiguous or of doubtful import, the circumstances surrounding the election may be given in evidence to explain it, and to enable the house to get at the voters' intent. We see no reason why a ballot ambiguous on its face may not be construed, in the light of surrounding circumstances, in the same manner and to the same extent as a written contract."

So in *Lee v. Rainey*, Smith's Cong. Elec. Cas. 589, it was found that votes cast for "Jas. H. Rainey" were intended for "Joseph H. Rainey," under extrinsic evidence admitted to prove the facts, and such ballots were counted for the latter. Under nearly similar and almost identical circumstances the same ruling has been adhered to or followed in a large number of cases, among them, *Blair v. Bartlett*, 1 Bartlett's Cong. Elec. Cas. 308; *Chapman v. Ferguson*, 1 Id. 267; *Boynton v. Loring*, 1 Ellsworth's Cong. Elec. Cas. 346; *Strobach v. Herbert*, 2 Id. 5; *Dean v. Field*, 1 Id. 90; *Chapin v. Snow*, Loring and Russ. Elec. Cas. 96; *Baker v. Hunt*, Id. 378; *Wright v. Hooper*, Id. 100; *Hood v. Potter*, Id. 217; *Hobbs v. Bartholmes*, Id. 182; *Shaw v. Buckminster*, Id.

222; *Root v. Adams*, Clarke and Hall's Cont. Elec. Cas. 271; *Williams v. Bowlers*, Id. 264.

A contrary rule was early announced in Michigan: *People v. Tisdale*, 1 Doug. 59, where it was held that votes cast for "J. A. Dyer" could not be counted for "James A. Dyer," nor extrinsic evidence introduced to show the intention of the voter, and this ruling was followed in *People v. Higgins*, 3 Mich. 233, and adhered to in *People v. Cicott*, 16 Id. 282; 97 Am. Dec. 141; where, however, the force of the preceding cases was considerably impaired, for only one of the three judges approved without qualification the rule above stated, and another, though formally adhering, disapproved the rule on principle; while the third, Judge Cooley, maintained that the rule should be entirely set aside, and in a vigorous dissenting opinion announced the true rule to be that which we quote from him in the beginning of this note. In the course of his remarks, the learned judge said: "The chief argument in favor of the rule of *People v. Tisdale*, *supra*, is, that ballots cast for parties by their initials only are so uncertain that they cannot be applied without resort to extrinsic and doubtful evidence to ascertain the voters' intention, and therefore should be rejected. But nothing can be more fallacious. It frequently happens that a man is better known by the initials of his baptismal name than by the name fully expressed, simply because he is not in the habit of writing his name in full, or of being thus addressed in business transactions. . . . The fallacy of the rule consists in its assuming that a certain form of ballot clearly expresses the voters' intention, while another form is so uncertain that it is dangerous to attempt to arrive at the meaning by evidence. But in fact no ballot can identify with positive certainty the persons for whom it was cast, and notice must be taken of extrinsic circumstances in order to apply it. It is always possible that other persons may reside in the election district having the same names with some of the candidates; but neither the canvassers nor the courts ever assume that there is any difficulty in these cases; but they count the votes for the persons who have been put forward for the respective offices; and in some cases where an element of uncertainty is introduced in the ballot unnecessarily, as by the addition of an erroneous designation, the courts resolve the difficulty by rejecting the erroneous addition, and counting the ballot for the person for whom it was evidently designed."

Rejection of Imperfect Ballots. — In Massachusetts it has been held that where there is such ambiguity in the writing or printing of the name of the person voted for, or of the office for which he is a candidate, that it is impossible to determine from the ballot itself the name of the person intended to be voted for, or the office which the voter intended him to fill, such ballot must be rejected; and no extrinsic evidence is admissible to supply the defect: *Boynton v. Loring*, 1 Ellsworth's Cong. Elec. Cas. 346. And where the number of persons to be voted for to fill an office is limited, a ballot containing the names of a greater number for that office is void, and must be thrown out. Thus in *People v. Loomis*, 8 Wend. 386, where the number of constables to be chosen was limited to four, ballots which contained the names of five persons designated as voted for for that office were rejected. So a ballot voted with two or more names upon it, where the tenure of office is limited to one person only, is void: *State v. Griffey*, 5 Neb. 161; *People v. Ames*, 19 How. Pr. 551; *Turner v. Baylies*, Clarke and Hall's Cont. Elec. Cas. 234. But this does not render the ballot void as to the other candidates on the ticket: *Attorney-General v. Ely*, 4 Wis. 420. Where the ballot contains the names of two candidates for one office, it is not competent to show

that the elector who voted the ballot intended to vote it for one of the parties named. The voter's intention cannot be shown to have been opposed or hostile to the ballot he deposited: *People v. Seamen*, 5 Denio, 509; *State v. Tierney*, 23 Wis. 430, where this was the sole question before the court, and where it is thoroughly discussed. Where several councilmen or school directors are to be elected for different terms, ballots which do not specify the terms for which they are intended must be rejected: *Milligan's Appeal*, 96 Pa. St. 222; *Gilleland's Case*, 96 Id. 224. So in *Clark v. Robinson*, 88 Ill. 498, it was held that where a ballot bore the name of "W. E. Robinson" in print and the name "Clark" in writing, with the printed words "for clerk of the circuit court" erased, such ballot should not be counted for any candidate.

BOEGER v. LANGENBERG.

[97 MISSOURI, 390.]

MALICIOUS PROSECUTION — SEARCH-WARRANT. — Action will lie for causing the issuance of a search-warrant maliciously and without probable cause. To sustain it, plaintiff must establish want of probable cause on the part of defendant with reference to the action actually taken by the latter in the matter complained of.

MALICIOUS PROSECUTION. — Party making complaint to a magistrate is not necessarily answerable for whatever judicial action the latter, of his own motion, may take in the premises. If he misconceives the remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for such error. He is only responsible for the complaint he actually makes, and for such action thereon as may be lawful and proper in view of it.

MALICIOUS PROSECUTION — SEARCH-WARRANT. — Where a complainant makes affidavit of facts before a magistrate, and assists in writing out a search-warrant for his signature, this is sufficient evidence of his participation in the issuance of the warrant.

FALSE IMPRISONMENT. — Neither malice nor want of probable cause need be proved to support an action of false imprisonment. Evidence tending to show that plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no authority to issue, is sufficient to sustain such action.

SEARCH-WARRANT — ARREST. — Under the law of Missouri, a search-warrant properly drawn cannot contain a clause of arrest. The function of such warrant is to cause a search to be made at a specified place for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate. If the facts stated in the sworn application for it also constitute a charge of crime, the magistrate may issue a separate warrant of arrest, though in that event the insertion of such order in the search-warrant would be a mere irregularity, not vitally affecting the legality of the process.

PROBABLE CAUSE CONSISTS of a belief in the facts or charge alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation.

MALICIOUS PROSECUTION. — Burden of proof is on plaintiff to show, in an action for malicious prosecution for arrest and search under an illegal

warrant, that defendant had no probable cause for the charges made by him on which plaintiff was arrested and his premises searched, and the discharge of plaintiff from arrest is not of itself sufficient evidence.

PROBABLE CAUSE. — Dismissal by the prosecuting attorney, against the objection of complainants, of an illegal warrant of arrest does not raise any inference of want of probable cause on their part in obtaining it.

MALICIOUS PROSECUTION — FALSE IMPRISONMENT. — Where, in an action, malicious prosecution is alleged in one count and false imprisonment in another, both based upon a search-warrant containing a clause of arrest, a recovery on one count is a bar to a judgment on the other.

MALICIOUS PROSECUTION. — Acquittal does not tend to establish want of probable cause for prosecuting an action of malicious prosecution.

Louis Hoffman, for the appellant.

L. F. Parker, for the respondents.

BARCLAY, J. The petition states three causes of action. The first is for malicious prosecution, and the second for false imprisonment, both relating to the issue of the same search-warrant with a clause of arrest. The third is for malicious prosecution of an information against the present plaintiff for receiving stolen goods. The answer is a general denial.

It appeared at the trial that defendants, in July, 1885, came before a justice of the peace in Gasconade County, and complained that plaintiff had bought some oak shingles or boards of one Jarvis, who had been making them from timber of defendants; that the boards belonged to them, and were on plaintiff's premises, etc. After some conference, the defendants prepared an affidavit and search-warrant by filling up blanks furnished by the justice. They both subscribed the affidavit. The justice then signed the warrant. The affidavit alleged: "That on or about the twenty-second day of July, 1885, Simon Boeger, or some person unknown, had received, taken, and carried away from the premises of Langenberg and Stoenner, in Boulware township and county of Gasconade, the following goods and chattels, the property of Langenberg and Stoenner, that is to say, one lot of oak shingles, between five and six hundred, made by Sam Jarvis out of timber belonging to Langenberg and Stoenner for the erection of a dwelling-house on the premises of Langenberg and Stoenner, and that they have reasonable grounds to suspect, and do suspect, that they are concealed on or about the premises of Simon Boeger, of the township and county aforesaid.

The search-warrant, after other recitals, commanded the officer to search the plaintiff's premises for the property, and if found, to bring the same, and also the plaintiff, before some

justice of the peace of the county, to be dealt with according to law. The warrant was returned executed by searching the premises of plaintiff and finding there the shingles, and by bringing the body of plaintiff into court. The justice's docket showed that a few days later plaintiff was discharged from arrest at the request of the prosecuting attorney of the county at the cost of the prosecuting witnesses.

The plaintiff also offered evidence tending to show that the information on which the third cause of action was predicated was filed by the prosecuting attorney; that defendants instigated it, and that upon a trial plaintiff was acquitted by a jury.

The evidence need not be set forth in detail. The material parts not already mentioned will be noted in the progress of this opinion.

At the close of plaintiff's case, the court instructed that plaintiff could not recover on any of his causes of action. Accordingly, the jury returned a finding for defendants on each of them. After the denial of his motion for a new trial, plaintiff appealed.

1. An action will lie for causing the issuance of a search-warrant maliciously and without probable cause. To sustain it, the plaintiff must establish, among other things, want of probable cause on the part of defendant with reference to the action actually taken by the latter in the matter complained of.

But a person making complaint to a magistrate is not necessarily answerable for whatever judicial action the magistrate, of his own motion, may take in the premises. If the magistrate misconceives the proper remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for such error on the part of the former. The complainant is responsible for the complaint he actually makes, and for such action thereon as may be lawful and proper in view of it. In the present case, however, the complainants not only made affidavit of facts before the justice, but assisted in writing out the warrant for his signature. This tended to show their participation in the issue of the warrant, irrespective of the statements in their affidavit. The warrant, in so far as it commanded the arrest of plaintiff, was illegal, the affidavit on which it was founded being in many respects insufficient to support it. The circuit court excluded that part of the warrant when offered at the trial, but it should have been admitted as directly tending to sustain the second cause of action, viz., for false imprisonment.

Evidence tending to show that the plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no authority to issue in the premises, is sufficient to sustain a count for false imprisonment. Neither malice nor want of probable cause need to be proved to support such an action.

Under the present law of Missouri, a search-warrant properly should not contain a clause of arrest. The function of such a warrant is to cause a search to be made by an officer, at a particular place, for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate. If the facts stated in the sworn application for it also constitute a charge of crime, the magistrate may issue a separate warrant of arrest, though in that event the insertion of such order in the search-warrant would be a mere irregularity not vitally affecting the legality of the process. But in the case at bar, the facts stated in the preliminary affidavit were wholly insufficient to justify the arrest of plaintiff. Hence there was evidence to go to the jury upon the count for false imprisonment.

The first count (for malicious prosecution) alleged the same facts concerning the procurement of the search-warrant, but the evidence offered did not tend to show any want of probable cause on defendants' part in the premises.

A definition of probable cause sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish. The complete legal idea expressed by that term is not to be gathered from a mere definition. But, perhaps, with reference to many practical cases, it may be nearly accurate to say that probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation. The plaintiff, in the present case, had the burden of proving, among other facts, under the first count, that the defendants had no probable cause for the charges made by them, on which plaintiff was arrested and his premises searched. This he failed to sustain. The discharge of the plaintiff from the arrest was not of itself such evidence on the facts here disclosed.

After the return of a search-warrant issued by a justice, his further proceedings are by law limited to the making of such orders regarding the property as may then appear proper. In this case no such order was made. The action of the justice

discharging the plaintiff at the costs of the prosecuting witnesses is referable to the order of arrest, improperly included in the search-warrant. A dismissal by the prosecuting attorney (against the objection of the complainants, as here shown) of an illegal warrant of arrest does not raise any inference of want of probable cause on the part of complainants in obtaining it, though they may be liable for false imprisonment on a proper showing (as already indicated with reference to the second cause of action).

Defendants could be held, in any event, to but one liability on the same facts. A recovery on the second count would be a bar to a judgment on the first count in this case. It is hence unnecessary to state more at length the reasons for our conclusion that no want of probable cause was shown to support the first cause of action. The ruling of the trial court, in its application to that count, was therefore correct.

2. Regarding the third count, the plaintiff showed an acquittal by jury on a trial of an information brought by the prosecuting attorney at defendants' instance against plaintiff. It is claimed that the acquittal tends to establish want of probable cause in moving that prosecution. This contention is so clearly contrary to the precedents that we dispose of it by merely referring to them: *Williams v. Van Meter*, 8 Mo. 339; *Townshend on Slander*, 709, and cases cited; 2 Greenl. Ev., sec. 455. The circuit court, therefore, correctly ruled as to the third count.

For the error made in not submitting the second cause of action to the jury, the judgment is reversed, and the cause remanded, with directions to retry that cause of action in accordance with this opinion, and after a finding on that count, to enter the judgment that may then be appropriate to that finding, and those already made by the jury on the first and third counts, which are not disturbed by this decision. The costs of this appeal are adjudged against respondents.

LIABILITY OF PERSON SUING OUT PROCESS. — A person who does no more than prefer complaint to a magistrate is not liable in trespass for acts done under the magistrate's process issuing thereon, even though the latter has no jurisdiction: *Barker v. Stetson*, 7 Gray, 53; 66 Am. Dec. 457; and where a warrant was issued to an officer, the party making the complaint was not liable for an act of the officer, unauthorized by the warrant, unless he is shown to have otherwise aided in or authorized the wrongful act: *Bartlett v. Hawley*, 38 Minn. 308. A creditor can in no way be jointly liable for any wrong of an officer in execution of process, unless he in some way parti-

ipated in it, or ratified and confirmed it after becoming aware of it: *Abbott v. Kimball*, 19 Vt. 551; 47 Am. Rep. 708.

FALSE IMPRISONMENT. — To establish the offense of false imprisonment, the imprisonment must be shown, and shown to have existed without the authority of a warrant, legal and valid upon its face: *Mitchell v. State*, 12 Ark. 50; 54 Am. Dec. 253; *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250. And the utmost good faith and firmest belief that a person has stolen goods, and secreted them, will not justify the owner of the goods in arresting, detaining, and searching, by the aid of a policeman, the suspected person; and in an action therefor, good faith is only material on the question of damages: *Mali v. Lord*, 39 N. Y. 381; 100 Am. Dec. 440.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — The advice of counsel for the commencement of a prosecution is no defense to an action for malicious prosecution, if it appears that the defendant did not believe that the accused was guilty: *Vann v. McCreary*, 77 Cal. 434. Good faith and honest motives, in the absence of probable cause for making a criminal complaint, are no defense in a suit for malicious prosecution: *Wilson v. Bowen*, 64 Mich. 133. To constitute probable cause, there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant an ordinarily cautious man in the belief that the arrested person was guilty of the charge against him: *Wilson v. Bowen*, 64 Mich. 133; *Thompson v. Beacon Valley etc. Co.*, 56 Conn. 493; *Donnelly v. Burkett*, 75 Iowa, 613. If probable cause is found to exist, no amount of malice will entitle plaintiff, in an action for malicious prosecution, to recover; for though malice is inferred from the want of probable cause, still where there does exist probable cause, malice, even affirmatively shown, will not entitle the plaintiff to a verdict: *Thompson v. Beacon Valley etc. Co.*, 56 Conn. 493. In an action for malicious prosecution, the fact that the plaintiff, upon preliminary examination, was held to answer before the grand jury is not conclusive that there was probable cause and a want of malice for the prosecution: *Diemer v. Herber*, 75 Cal. 287. But where a party obtains a judgment or decree against another, and the latter subsequently sues the former for malicious prosecution, the judgment is ordinarily conclusive evidence of probable cause; but this is not true where the judgment was procured by fraud, in which case the judgment is not the least evidence whatever of probable cause: *Clements v. Odorless Ex. App. Co.*, 67 Md. 605.

PROBABLE CAUSE IS A QUESTION FOR THE COURT. — In an action for malicious prosecution, probable cause is a question of law for the court; and the court must charge the jury as to what facts will constitute probable cause: *Bell v. Keepers*, 37 Kan. 64. The question of probable cause is primarily for the court, but if the facts tending to establish the existence of the want of probable cause are in dispute, then it is the duty of the court to submit the question under proper instructions to the jury: *Atchison etc. R. R. Co. v. Watson*, 37 Kan. 773. But while the question of probable cause is primarily one of law for the court, whether the prosecution originated in malice is a question of fact for the jury: *Bartlett v. Hawley*, 38 Minn. 308. Compare *Clements v. Odorless Ex. App. Co.*, 67 Md. 461; 1 Am. St. Rep. 409, and note 412; *Everett v. Henderson*, 146 Mass. 89; 4 Am. St. Rep. 284; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606, and note 607, 608.

BOHANNON v. COMBS.

[97 MISSOURI, 446.]

JUDGMENT WILL NOT BE DISTURBED where there is abundant evidence to sustain it, though there may be some evidence to the contrary effect.

DOWER — FRAUDULENT DEED BY HUSBAND AND WIFE. — Where a conveyance by the husband in which the wife joins is set aside as fraudulent as to creditors, the wife's right of dower is revived, and it makes no difference that she contracted with her husband to relinquish her dower in the land granted in consideration of receiving the residue after the satisfaction of the debts mentioned in the deed, because the deed of the husband being void, there is no estate in the grantee upon which the relinquishment of dower can operate, and she is therefore restored to her former rights.

Draffen and Williams and W. S. Shirk, for the appellant.

George P. B. Jackson, for the respondents.

SHERWOOD, J. This is an equitable proceeding whereby it is sought to be set aside as fraudulent certain deeds and a judgment which placed the title to certain land in Pettis County, formerly belonging to William E. Combs, in defendant Pigg, as trustee for Mrs. Combs, and vest it in the plaintiffs as heirs of their father, Charles E. Bohannon, who had bought the land at execution sale on a judgment against William E. Combs, who was a party defendant when this cause was here before, but who has since died.

On a former occasion, we held the transactions mentioned as fraudulent, reversed the judgment, and remanded the cause: 79 Mo. 305. On the return to the lower court of this cause, it was again heard, and the evidence the same as before, so far as concerns the main issues in the cause, resulting in a decree in favor of plaintiffs declaring the deeds, judgments, etc., fraudulent and void as against plaintiffs, etc. But the lower court also decided that the title of the lands thus decreed to be in plaintiffs be held by them subject to the dower of Nancy H. Combs, widow of the decedent, William E. Combs, and commissioners were appointed who assigned and set apart the dower interest of said widow in said lands. There was abundant evidence to sustain that portion of the decree which declared the transaction therein mentioned as fraudulent and void; and though there was evidence of a contrary effect, the decree on that point, coinciding as it does with the former adjudication of this court, will not be disturbed, but will be affirmed.

Now, in relation to the residue of the decree: Although

there are authorities to the contrary, the better opinion is, that when a conveyance of the husband in which the wife joins is set aside as being fraudulent as to creditors, this will result in reviving the wife's right of dower; for that the deed of the husband being void, there is no estate left in the grantee upon which the relinquishment of dower can operate; hence the wife is restored to her former rights: *Robinson v. Bates*, 3 Met. 40; *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335; *Dugan v. Massey*, 6 Bush, 81; *Blanton v. Taylor*, Gilmer, 209; *Belford v. Crane*, 16 N. J. Eq. 265; *Wyman v. Fox*, 59 Me. 100; *Stinson v. Sumner*, 9 Mass. 143; 6 Am. Dec. 49; *Humes v. Scruggs*, 64 Ala. 40; *Richardson v. Wyman*, 62 Me. 280; 16 Am. Rep. 459; *Hinchcliffe v. Shea*, 103 N. Y. 153; *Summers v. Babb*, 13 Ill. 483; *Woodworth v. Paige*, 5 Ohio St. 70. The doctrine announced and supported by the foregoing authorities has received the approval of an eminent author: 1 Washburn on Real Property, 5th ed., 261.

From these considerations it follows that it becomes wholly immaterial whether Mrs. Combs made any contract with her husband to relinquish her dower in the land granted to Heard and Trigg, as trustees, in consideration of receiving whatever residue of the land there might be after the satisfaction of the debts mentioned in said deed; because that deed, having been overthrown and for naught held on account of its fraudulent character, the grant of the inchoate right of dower fell with it, as it was not the alienation of an estate, but the mere incident of the principal thing, the conveyance of the fee by the husband, and of course perished with its principal, because there was no estate left to support it, and because there was no one in whom the bare relinquishment of dower could vest: *Moore v. Harris*, 91 Mo. 616.

We therefore affirm that portion of the decree also which assigned dower to Mrs. Combs.

APPELLATE PRACTICE — EVIDENCE REVIEWED. — On appeal, the finding of facts by the court, which has the force and effect of a verdict of the jury, will not be disturbed, if there is any evidence, which, fairly considered, will support such finding: *Swayne v. Waldo*, 73 Iowa, 749; 5 Am. St. Rep. 712; *Bockenstedt v. Perkins*, 73 Iowa, 23; 5 Am. St. Rep. 652; *Gabbert v. Jeffersonville R. R. Co.*, 11 Ind. 365; 71 Am. Dec. 358. In like manner, neither will a verdict of the jury be disturbed on appeal when there is any evidence tending to sustain it: *Atchison etc. Co. v. Sadler*, 38 Kan. 128; 5 Am. St. Rep. 729; *Muse v. Stern*, 82 Va. 33; 3 Am. St. Rep. 77, and note; *Reiley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737; *Pennsylvania Co. v. Sloan*, 125 Ill. 72; 8 Am. St. Rep. 337. A judgment will not be reversed on the mere weight of

evidence: *Queen Ins. Co. v. Studebaker etc. Co.*, 117 Ind. 416. Though the evidence in support of a verdict is meager, the appellate court will not set it aside for that reason: *Acree v. Brayton*, 75 Iowa, 719. The finding of the court upon a question of fact has the force and effect of the verdict of a jury, and cannot be set aside on appeal if there is any evidence to sustain it: *Warfield v. Warfield*, 74 Id. 184. There being some evidence tending to show that a note and mortgage given by a husband to his wife were founded upon a valid consideration, and were not fraudulent, a verdict based on such evidence will not be disturbed on appeal: *First National Bank of Nevada v. Fenn*, 75 Id. 221. Inasmuch as the appellate court cannot conclude that the jury, in their honest, intelligent, and unbiased discretion, were not justified by the evidence in finding for the plaintiff, their verdict cannot be disturbed: *Haskell v. City of Des Moines*, 74 Id. 110. The appellate court will never weigh evidence for the mere purpose of determining the preponderance: *Isler v. Bland*, 117 Ind. 457. Controverted questions of fact will not be reconsidered on appeal: *Chicago etc. R'y Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380; *Isler v. Bland*, 117 Ind. 457; *Hunt v. Elliott*, 77 Cal. 588; *Dickens v. City of Mes Moines*, 74 Iowa, 216; *Schaben v. Brunning and Son*, 74 Id. 102; *Johnson v. Leffingwell*, 74 Id. 114; *Coffman v. Acton*, 74 Id. 147; compare *Nally v. McDonald*, 77 Cal. 284. Where a bill of exceptions only specifies that the decision is against the law, and does not specify any particulars in which the evidence is insufficient to justify the decision, the evidence cannot be reviewed on appeal; but the findings must be taken as true: *Malone v. County of Del Norte*, 77 Cal. 217. The appellate court has no concern with the evidence adduced before the jury touching the innocence or the guilt of the accused; it deals only with questions of law, and only with such when presented to them in the proper shape: *State v. Perkins*, 40 La. Ann. 210. But there are holdings to the effect that a judgment will be reversed on appeal if there is an absolute failure of evidence upon any material point to sustain it: *O'Donahue v. Creager*, 117 Ind. 372; *Keiser v. Beam*, 117 Id. 31; and so where facts found by the court below are brought upon record by bill of exceptions, in a case before the court without a jury, both as to law and facts, the appellate court has power to review the rulings of law made by the court upon the facts found by it: *Rexroth v. Coon*, 15 R. I. 35; 2 Am. St. Rep. 863.

HUSBAND AND WIFE—DOWER.—A wife's dower is not barred by the wife's release executed by joining with her husband in a deed which is afterwards set aside as fraudulent and void as against creditors: *Malloney v. Horan*, 49 N. Y. 111; 10 Am. Rep. 335; *Richardson v. Wyman*, 62 Me. 280; 16 Am. Rep. 459; *Morton v. Noble*, 57 Ill. 176; 11 Am. Rep. 7; *Ridgeway v. Masting*, 23 Ohio St. 294; 13 Am. Rep. 251; *Stinson v. Sumner*, 9 Mass. 143; 6 Am. Dec. 49, and note 52.

WOLFE v. MISSOURI PACIFIC RAILWAY COMPANY.

[97 MISSOURI, 473.]

COMMON CARRIER — MISDELIVERY — PARTIES. — Agent who has contracted with a carrier to deliver goods consigned to him at a particular place, and who has no pecuniary interest in them except his lien for commissions, is a trustee in an express trust under section 3463 of the Revised Statutes of Missouri, 1879, and may maintain an action for their wrongful delivery, in his own name.

COMMON CARRIER — DELIVERY. — Common carrier may sometimes deliver goods to the true owner instead of to him who gave them into its charge for carriage. Thus where the contract is to carry and deliver according to the shipper's orders, or to account for the goods, the carrier may show that they have been delivered to the real owner upon his demand.

COMMON CARRIER — DELIVERY. — To justify delivery to the true owner, contrary to or without the shipper's orders, the carrier has the burden of proving the ownership and immediate right of possession in the person to whom such delivery is made.

COMMON CARRIER — DELIVERY. — Where a carrier has contracted to carry goods to a particular point, and there deliver them subject to the shipper's order, he cannot lawfully deliver them to an intending purchaser without orders, when the shipper has not in fact parted with his right of possession, and if the carrier does so deliver them, it is without authority and at his own risk.

EVIDENCE — COMMUNICATION BY TELEPHONE. — When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible.

Bennett, Pike, and Henry G. Herbel, for the appellant.

Taylor and Pollard, for the respondents.

BARCLAY, J. Plaintiffs brought this action to recover damages for breach of a contract for the carriage and delivery of seven car-loads of wire. No questions arise requiring any special reference to the pleadings. They properly present the issues made by the facts hereafter discussed. The cause was tried by Hon. Daniel Dillon, as circuit judge, a jury having been waived.

It appeared at the trial that Henry Fuchs, a barb-wire manufacturer in St. Louis, in April, 1884, made a written contract with the Cambria Iron Company of Johnstown, Pennsylvania, by which the iron company was to furnish said Fuchs with "twelve tons of wire per day for twenty-five business days, beginning April 30th, and then thirteen tons per day for

twenty-five business days," at certain-named prices; settlements were to be monthly; "less two per cent discount for payment in ten days from date of shipment"; and that "the seller's responsibility for goods in transit should cease when they pass into custody of the transporting company." The iron company, in pursuance of this agreement, shipped ten car-loads of wire for said Fuchs, but consigned the same to Wolfe and Good (the plaintiffs), their St. Louis agents, at East St. Louis. On the arrival of the wire at East St. Louis, it was delivered to the St. Louis Bridge and Tunnel Company, by the Ohio and Mississippi railway (the terminal carrier), in obedience to Wolfe and Good's instructions, and was by the Bridge and Tunnel Company then delivered to defendant for transfer and delivery at Pope's switch, Fourteenth and Gratiot streets, in St. Louis. No bill of lading was issued to Wolfe and Good, or to any other person, by either the Bridge and Tunnel Company or the defendant, for the hauling of this wire from East St. Louis to St. Louis.

There was a custom prevalent with roads terminating at East St. Louis and St. Louis to designate the destination of cars thus transferred across the river by tacking a card of a particular color on the car door, which indicated to the receiving carrier the particular depot, switch, or side-track on which the car was to be placed, different colored cards representing the several depots, switches, and side-tracks. The cars containing this wire were designated by blue cards, which indicated Pope's switch as their destination. That was a private switch used by the Pope Iron and Metal Company and two or three other establishments, among them Fuchs's Wire Works.

The wire was shipped in three or four car-load lots. Three car-loads were received by defendant and delivered to Fuchs on written orders of Wolfe and Good. Prepayment of the purchase price of these three car-loads was not exacted of Fuchs by Wolfe and Good. The remaining seven cars were delivered by defendant to Fuchs, on his demand, at different dates in May, 1884. That delivery constitutes the gist of this action. Whether it was made with the consent of plaintiffs, Wolfe and Good, or without it, was the main issue of fact tried. The evidence conflicted on that point. The trial court found that the delivery was without their consent.

It further appeared in evidence that plaintiffs, as agents for the Cambria Iron Company, had no other pecuniary interest in the wire than for the payment of their commissions, and

that immediately upon receipt of advices from the Cambria Iron Company of the shipment in controversy, Wolfe and Good had sent to Fuchs invoices, or bills of account, for the car-loads in question, which he received several days before the wire arrived. In the progress of the trial, the court admitted testimony of alleged conversations by telephone connected with plaintiffs' office, though the witness did not identify the voice he heard at their instrument.

The court made the following declarations of law, against defendant's objections, viz.:—

"The court declares the law to be, that a person in whose name a contract is made for the benefit of another is a trustee of an express trust, and as such can maintain an action in his own name. If, therefore, the court finds, from the evidence, that the contract of the defendant to carry the goods in question from the place where it received the same to Fourteenth and Gratiot streets was made in the name of plaintiffs, though for the benefit of the Cambria Iron Company, then the plaintiffs would have a standing in court, and could recover, if the delivery to Fuchs was wrongful.

"The court further declares the law to be, that if it finds, from the evidence, that on the arrival of the goods in question at East St. Louis, the plaintiffs received said goods in pursuance of the bills of lading read in evidence; that thereafter plaintiffs ordered the St. Louis Bridge and Tunnel Railroad Company to have said goods delivered to Fourteenth and Gratiot streets; that the delivery of said goods included the hauling of said goods from the eastern terminus of defendant's railroad to said Fourteenth and Gratiot streets; that said defendant received said goods of said St. Louis Bridge and Tunnel Railroad Company, and in delivering said goods defendant acted, in law, simply as agents of plaintiffs; and if the court further finds that such contract for delivering by defendant was made in the name of plaintiffs, then said plaintiffs would stand in the relation of trustee of an express trust, and as such, could sue defendant for the goods in question, if wrongfully delivered.

"The court further declares the law to be, that defendant had nothing to do with the contract between the Cambria Iron Company and Fuchs for the purchase of wire. The defendant could not constitute itself an arbitrator touching any matter of difference between the parties of said contract. It was the duty of the defendant to deliver the goods in question

to Wolfe and Good, the consignees, or else to such person as they might deliver the bills of lading properly indorsed, or else such person as they might order said defendant to deliver the goods to."

The court then found for plaintiffs in the sum of \$7,028.17, the value of the seven car-loads of wire. After moving for a new trial without avail, and duly saving exceptions, defendant appealed.

1. Plaintiffs' right to maintain this action was made an issue by the answer. It is naturally the first subject of consideration. The goods in question were billed by the iron company to plaintiffs at East St. Louis. They received them there, and, in their own firm name, contracted for their delivery at Pope's switch, in St. Louis, to themselves. They were acting as factors for the iron company in the transaction, having no pecuniary interest in the goods beyond their lien for commissions. By our code of practice, it is provided that every civil action must be prosecuted in the name of the real party in interest, with certain exceptions. Among these is a "trustee of an express trust," who may sue in his name without joining the person for whose benefit the action is prosecuted. The statute explicitly declares that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another": R. S. 1879, sec. 3463. Plaintiffs fairly come within this statutory definition. In this regard, the code merely designed to preserve a right of action which existed by the modern common law of England on such facts as here appear: *Short v. Spackman*, 2 Barn. & Adol. 962; *Drinkwater v. Goodwin*, 1 Cowp. 251. Our statute, above quoted, is the same as a section of the code of New York. The uniform interpretation of it there permits such actions as this to be maintained: *Grinnell v. Schmidt*, 2 Sand. 706; *Considerant v. Brisbane*, 22 N. Y. 389; *Ladd v. Arkell*, 37 N. Y. Sup. Ct. 40; *Wetmore v. Hegeman*, 88 N. Y. 69. We are of opinion that the instructions correctly declared the law regarding plaintiffs' right to sue.

2. On the merits, the chief contention of defendant is, that the facts here presented, explained by the terms of the contract between the iron company and Fuchs, justified the delivery of the wire in question to Fuchs. On this branch of the case, the only facts that can properly be reviewed are those which now remain admitted or undisputed. An issue

was determined in the trial court regarding this delivery to Fuchs, defendant asserting that plaintiffs consented to it, and plaintiffs denying that assertion. On that issue the evidence was quite conflicting. No sufficient reason has been assigned for disturbing the finding of Judge Dillon that plaintiffs did not assent to such delivery. That was evidently the chief point of difference in the case, and its decision has greatly narrowed the field of this controversy.

Defendant concedes its duty to carry and deliver the wire to Pope's switch; but claims that, on the undisputed facts, Fuchs was the true owner, and that its delivery to him was therefore lawful. Undoubtedly a carrier, in some circumstances, may deliver goods to the true owner instead of to him who gave them into its charge for carriage. Its contract (subject to certain exceptions not in consideration here) is to carry and deliver (according to shipper's orders), or to account for the goods. It would be a lawful accounting to show that they had been delivered to the real owner upon his demand. This principle is now so well established in the law that the mere statement of it will suffice for the purposes of this case: *The Idaho*, 93 U. S. 579; *West. Trans. Co. v. Barber*, 56 N. Y. 544.

But to justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery. Among other things, it must establish the immediate right of possession in the person to whom such delivery is made. Referring to the facts before us, it may have been a breach of the contract (existing between Fuchs and the iron company) for the latter to refuse to deliver the wire to the former without prepayment of the price. But the carrier, engaged to convey the wire to the point of contemplated delivery, could not lawfully transfer to the purchaser the right of possession, if the shipper did not, in fact, part with that right.

Whether the seller retains the *jus disponendi* (as the text-writers term it) is often a question of fact, depending on the intention of the parties, to be gathered from their acts, as in this instance. The disposition of the bill of lading, which in the commercial world is recognized as the emblem of the property itself, frequently throws light on that intention. Here the owner did not bill the wire to the purchaser, but consigned it to its own local agents, the plaintiffs. The latter, without transferring the bills of lading, made a further contract of their own, whereby defendant was to carry the goods to the

place where delivery to the purchaser was expected to be made. This last contract for carriage was evidenced by no writing, but its terms are not disputed. The wire was deliverable by defendant at Pope's switch, only to the order of plaintiffs, though such order might (in the circumstances) have been merely verbal. The invoices and contract of sale between Fuchs and the iron company were admitted in evidence as part of the *res gestæ*, explanatory of the acts of the parties; but the carrier was no party to the contract, and had no right to act on its own interpretation of the duties which the parties owed to each other according to its terms.

Whether or not under it the shipper's agents should have delivered possession of the wire to the purchaser on its arrival at the switch, was a question which it did not devolve on the carrier to decide. Until the shipper, whose goods it had in charge, parted with the right of possession, the intending purchaser did not become the owner. Until then, any delivery by the carrier to him (on the facts here considered) was at its own risk.

There was ample testimony to support the finding of the trial court that the right of possession was not surrendered by the seller or its agents, the plaintiffs, and that the delivery by the carrier was without authority. The instructions given by the trial court correctly stated these principles.

3. A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiffs' private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is

intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it.

Finding none of the assignments of error well taken, we affirm the judgment.

CARRIERS — DELIVERY. — The delivery of goods by a common carrier not in accordance with the bill of lading is at the carrier's risk, and the title to the property remains in the consignor until delivery in accordance with conditions: *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626, and note 628, as to the misdelivery by carriers in general. If a common carrier delivers goods to a person other than the consignee, even innocently and by mistake, yet without order or authority of the consignor, the carrier is liable to the consignor for their value in case of loss: *Wernwag v. Philadelphia etc. R. R. Co.*, 117 Pa. St. 46; to the same effect substantially is *McEntee v. New Jersey S. Co.*, 45 N. Y. 34; 6 Am. Rep. 28, and note 30. A carrier must obey the instructions of the owner or shipper of goods as to their delivery: *Michigan etc. R. R. Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278.

THE LAW OF THE TELEPHONE is the subject of a note to *Central U. Telephone Co. v. Falley*, ante, pp. 128-136.

HALL v. KNAPPENBERGER.

[97 MISSOURI, 509.]

GIFT — EVIDENCE MUST CORRESPOND WITH ALLEGATIONS. — Evidence showing a written assignment of a note "for value received," and a direction to the bailor thereof to deliver it to defendant, will not support the plea of a gift.

GIFT — UNDUE INFLUENCE. — An alleged gift of a note for five thousand dollars by a man eighty years old troubled with Bright's disease, and most of the time in a somnolent state from the use of opiates, to his confidential friend, agent, adviser, and business manager, is presumptively void, and the burden of proof is on the donee to show the absolute fairness and validity of the gift, and that it is free from the taint of undue influence. This rule is the same at law as in equity.

Hall and Sons, A. M. Hough, and Prosser Ray, for the appellant.

J. L. Mirick, and Kinley and Wallace, for the respondent.

SHERWOOD, J. Action by plaintiff as administrator *de bonis non* of the estate of John Reeves, deceased, to recover from defendant the amount of a promissory note for five thousand dollars collected by him during the lifetime of the decedent,

which note the petition charges to have been obtained by defendant through covinous methods and by undue influence. The answer pleads that the note was a gift, etc.

1. The evidence offered to support the plea of a gift had no tendency in that direction, since it showed a written assignment of the note "for value received," and directed a banker in Illinois, who was the bailor of the note, to deliver it to defendant. Of course evidence of such a character could no more sustain the plea of a gift of the note than would evidence of the gift of the note sustain a plea of the transfer of the note for a valuable consideration. The familiar doctrine must not be lost sight of that the evidence must correspond with the allegations of the pleading.

2. But apart from such considerations, the evidence shows by a decided preponderance that the deceased was about eighty years old; had Bright's disease; to relieve his pains, frequently took twenty-five or thirty grains of opium per day, and in consequence of which was for most of the time in a somnolent condition; and besides, that defendant was the confidential friend, agent, adviser, and business manager of the deceased, who was under his thumb; and that the note in question was about all the personal estate that the old man had left, insomuch that only fifteen dollars in money was inventoried by defendant when he took out first letters on Reeves's estate. If, in such circumstances, a gift of any considerable value be bestowed by the one who reposes confidence upon the one in whom confidence is reposed, such gift is presumptively void. The burden is cast upon the recipient of the gift, and it belongs to him to show the absolute fairness and validity of the gift, and that it is entirely free from the taint of undue influence. This sound and wholesome doctrine applies as well to suits at law as to proceedings in equity, and is as broad in its scope as the existence of confidential or fiduciary relations. The rule "stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another." Lord Cottenham remarked in *Dent v. Bennett*, 4 Mylne & C. 269, that he would not "narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely used." And in *Gibson v. Jeyes*, 6 Ves. 266, when speaking of dealings between parties situated as above mentioned, said: "Those who meddle with such

transactions take upon themselves the whole proof that the thing is righteous." This whole subject was gone into in the recent case of *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 713, where many of the authorities will be found collected.

As this cause was not tried in conformity with the theory there laid down, the judgment will be reversed and the cause remanded, with directions to proceed in conformity with this opinion.

GIFT — THE EXISTENCE OF CONFIDENTIAL OR FIDUCIARY RELATIONS imposes upon the recipient of a gift the *onus* of establishing its absolute fairness. In the presence of such relations, a court of equity will presume confidence placed and influence exerted: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 713, and note 720, and cases therein cited, as well as cases cited in the principal case, *Gay v. Gillilan, supra*, which is a recent case, and discusses the subject thoroughly.

HOLLOWAY v. HOLLOWAY.

[97 MISSOURI, 623.]

IN PARTITION SUIT, the order of sale is not a final judgment from which an appeal will lie.

PARTITION. — CHANCERY HAS JURISDICTION in partition suits; and as incident thereto, and in order to do complete justice and avoid a multiplicity of suits, it will take an account of the mesne rents and profits in perception by one tenant in common to the exclusion of the other, and of money paid to remove an encumbrance on the common property by one of the tenants.

PARTITION — RENTS AND PROFITS — ENCUMBRANCE. — Where one co-tenant is in receipt of all the rents and profits, and in the exclusive use and enjoyment of the whole premises, refusing to let his co-tenant in, and such ousted co-tenant has paid money to relieve the common property of encumbrances in whole or in part, the court will declare a charge in favor of the ousted tenant for the amount of his share of the rents and profits, and for the amount such ousting co-tenant ought to have contributed in discharge or reduction of the encumbrance on the share of such tenant, to be paid out of the proceeds of the sale of the property in partition before division thereof is made between the tenants, according to their respective rights and interests in the premises.

PARTITION — RENTS AND PROFITS — PLEADING. — An averment in an action for partition that the annual rents and profits are a certain amount, and that defendant as co-tenant is in exclusive reception thereof, and refuses to allow plaintiff any part thereof, is not a certain and definite allegation that plaintiff has been ousted from the joint occupancy of the land; and if defendant desires to take advantage of such uncertainty, he must move to have the complaint made more definite and certain instead of aiding it by answer that he is in actual and exclusive possession, and that plaintiff has no possession, right, title, interest, or estate in the land.

PARTITION — RENTS AND PROFITS — APPEAL. — Where the court in a partition suit is authorized by the pleadings, it may find the value of the rents and profits from the time of defendant's ouster of his co-tenant until the day of sale, and charge them upon defendant's share of the proceeds of such sale; but it cannot declare plaintiff's share of the rents and profits for a particular year a lien on the crops for that year, and order that special execution issue therefor; such an order is void, and cannot have the effect of converting an otherwise interlocutory order of sale into a final judgment from which an appeal will lie.

PARTITION — EJECTMENT — ADVERSE TITLE. — In partition, the adverse claims of parties to the same undivided interest in real estate may be decided, and it is only when the defendant is in adverse possession of the whole premises, claiming title adversely to one who claims to be his co-tenant, that such co-tenant can be driven to the action of ejectment; but apart from such adverse possession alone, without showing to any title to plaintiff's undivided interest, and without evidence casting doubt upon his title, he cannot be compelled to resort to ejectment.

PARTITION — JURISDICTION. — Where in partition by one tenant against his co-tenant in possession the latter alleges that the title claimed by plaintiff belongs in equity to a third person, and that to establish such equity it may be necessary to invoke the powers of a court of equity, the court having charge of the partition proceedings will entertain jurisdiction and decide the matter.

PARTITION — EQUITABLE INTEREST — JURISDICTION. — Where in an action for partition of an equitable interest by one co-tenant against his co-tenant in adverse possession, and the legal title is in defendant, who is a trustee, while the equitable title of plaintiff is attempted to be put in issue, the latter title may be tried in the action.

NEW TRIAL — ABSENCE OF COUNSEL. — Where a cause comes on for trial in its regular order, under the rules of the court in which it is at issue, at a time when counsel, owing to a different rule in an adjoining circuit, does not expect it to come on, and in consequence of which he is not present at the trial, this is no ground for a new trial, in the absence of misrepresentations or bad faith on the part of counsel on the other side.

R. H. Field and J. H. Kyle, for the appellant.

Railey and Burney, for the respondents.

BRACE, J. This is an action for partition and sale of real estate. The amended petition on which this case was tried is substantially as follows: That plaintiffs are husband and wife; that on the ninth day of October, 1883, said plaintiff George C. Holloway, husband, was the owner of the real estate sought to be divided; that on that day he executed a deed of trust on all of said lands, except twenty acres, to the defendant Ingram to secure a note of four thousand dollars and interest, due from said Holloway to the defendant the Missouri Trust Company; that afterwards, on the 1st of November, 1883, the said George W. Holloway conveyed an undivided

half interest in all the land sought to be divided to the defendant John M. Holloway subject to said deed of trust on all of it, except the said twenty acres; that afterwards, on the 2d of April, 1884, the said John M. Holloway executed a deed of trust on his undivided half interest in said land to defendant Henry Cordell, to secure the payment of his note for \$2,384, payable to George W. Holloway with interest; that afterwards said note was assigned by the said George W. to the said defendant T. P. Holloway, who is the present owner thereof; that afterwards, on the 7th of April, 1884, the said George W. and wife, subject to said deed of trust held by the said trust company, conveyed his remaining undivided half interest in said lands to the said John M.; that on the same day the said John M. executed a deed of trust on said lands to the said Cordell to secure the payment to the said George W. of a note executed by the said John M. to the said George W. for \$3,200, and interest; that afterwards, on the eighth day of April, 1884, the said George W., for value, assigned and delivered said note and deed of trust to the plaintiff S. A. G. Holloway, his wife; that afterwards, on the first day of January, 1885, the said John M. and wife, in payment and discharge of said note and deed of trust by warranty deed, conveyed an undivided half interest in said real estate to the plaintiff S. A. G. Holloway; that no part of the money due the said defendant T. P. Holloway has ever been paid; that by reason of the premises, the said S. A. G. Holloway is the owner in fee as her ordinary legal estate, of the one undivided half interest of said real estate, subject to the deed of trust held by said trust company, and the said John M. Holloway is the owner of the remaining undivided half interest subject to said deed of trust, and also subject to the deed of trust held by the said T. P. Holloway on his undivided interest; that the interest on the note secured by the deed of trust held by the trust company due for April and October, 1885, amounting to \$240, has been paid by the said S. A. G. Holloway, and that on the 1st of April, 1886, she also paid \$120 interest on said note, and taxes on said real estate amounting to \$149; that the rental value for said real estate for the year 1885 was \$1,000, the whole of which said John M. Holloway collected, realized, and retained, and refused to allow plaintiffs any part thereof; that said defendant is insolvent; that by reason of the interests, encumbrances, etc., said real estate cannot be divided in kind. "Wherefore plaintiffs pray the court to render a decree

for the sale of the whole of the real estate aforesaid; that the proceeds thereof be divided among the parties according to their interests therein; that the notes and mortgages due the Missouri Trust Company be first paid off in full, or the land sold subject to the same, as may to the court seem to be to the best advantage of all concerned; that one half of the balance be paid to said S. A. G. Holloway, together with whatever may be due her from said John M. Holloway for interest and rents as aforesaid; that the notes and mortgages due to T. P. Holloway be paid out of the interest of John M. Holloway as aforesaid, and that the said last-mentioned notes be paid, as well as the amount due to S. A. G. Holloway on account of the rents and interest aforesaid, the balance to be paid to said John M. Holloway, and for such other and further relief as to the court may seem right and proper."

To this petition, the defendant John M. Holloway, on the 16th of March, 1886, answered as follows: "Now comes John M. Holloway, and for his separate answer to the petition of plaintiffs, denies each and every allegation contained therein save what is hereinafter expressly admitted, wherefore he asks judgment. And for a second and further defense to this action, this defendant states that he is in the actual and exclusive possession of the whole of said real estate, and was at and has been ever since the institution of this case; that so far as the said plaintiff S. A. G. Holloway is concerned, she has no possession of right, title, interest, or estate in said land; that at the time of the alleged conveyance to S. A. G. Holloway, her co-plaintiff herein was indebted to various persons, in the aggregate in excess of ten thousand dollars, being as much as or in excess of the value of said George W. Holloway's property, real and personal, and for that reason and consideration and no other than the return to this defendant of his note by said George W. Holloway, and for no consideration whatever from the said S. A. G. Holloway, said conveyance was made in her name, and delivered to the said George W. Holloway, but not to her, to hinder, delay, defraud, and deceive his creditors, by thus covering up his property; that one J. H. Arnold, one of such creditors, obtained judgment against said George W. Holloway and defendant for the sum of — dollars, at Kansas City, in the circuit court of Jackson County, state of Missouri, at the April term of said court, in 1885; that afterwards, at the instance of said Arnold, an execution was duly issued on said judgment to the sheriff of

Cass County, Missouri, and at the last November term of the circuit court of said county of Cass, state of Missouri, all the right, title, interest, and estate of the said George W. Holloway in the real estate in controversy was duly sold and conveyed by said sheriff to one James M. Holloway, who is not a party to this action; and the said James M. Holloway and this defendant are the sole owners of said real estate, and neither of plaintiffs have now any right or estate therein."

The other defendants did not answer. The plaintiff replied to the answer of John M. Holloway, denying all its allegations. On the twentieth day of July, 1886, the case coming on for trial, the court found the issues for the plaintiff, made a finding of the facts substantially as set out in the petition, and that said J. M. Holloway is justly indebted to the said S. A. G. Holloway in the sum of \$254.50, being one half of the sum paid by her for interest and taxes, as stated in the petition; "that the rental value of the real estate mentioned in plaintiff's petition for year commencing March 1, 1885, and ending March 1, 1886, was \$1,005; that the rental value of said real estate from March 1, 1886, to March 1, 1887, is \$825; that said John M. Holloway has held possession of said real estate since March 1, 1885, and has refused to allow said plaintiffs or T. P. Holloway to enter and hold or enjoy the same, or any portion thereof, and still holds the same, and is receiving all profits of same, although demand has been made to jointly occupy same with him, after he had conveyed to said S. A. G. Holloway the undivided one half thereof by warranty deed; that said John M. Holloway is justly indebted to said S. A. G. Holloway in the sum of \$915 for one half of the rent due for said two years; that said John M. Holloway is justly indebted to said S. A. G. Holloway, on account of interest, taxes, and rents as aforesaid, in the sum of \$1,169.50; that of said last sum there is due from said John M. Holloway to said S. A. G. Holloway, for rent of 1886, and up to March, 1887, the sum of \$412.50; that said John M. Holloway is insolvent; that said George W. Holloway, at the commencement of this suit, had no interest in any of the real estate herein mentioned, nor has he since had any interest, except his marital interest as husband of S. A. G. Holloway; that said S. A. G. Holloway is the owner in fee, as her ordinary legal estate, of the undivided one-half interest in all of the real estate heretofore mentioned; that said real estate, by reason of the respective rights of the parties hereto, cannot be partitioned in kind; that it is for the

best interests of all concerned that all of said real estate, except said twenty acres, should be sold, subject to the mortgage or deed of trust of said Missouri Trust Company."

The court then entered the following interlocutory decree or order: "It is therefore considered, adjudged, and decreed by the court that all the real estate heretofore mentioned herein be sold at public sale, one third for cash, one third due in one year, and the remainder due in two years, with both deferred payments drawing interest at eight per cent per annum, except the twenty acres heretofore described, and a deed made therefor, subject to the lien and deed of trust of said Missouri Trust Company, or the holder of said note and mortgage. It is further ordered that out of the amount due said John M. Holloway on proceeds of the sale of his undivided half interest in said land, that there be first paid to said Thomas P. Holloway, on his mortgage or deed of trust aforesaid, the sum of \$2,384, with interest thereon from November 1, 1883, at the rate of seven and one fifth per cent per annum; that out of the remainder of said John M. Holloway's interest in the proceeds arising from the sale of his half interest in the land aforesaid, that there be paid to said S. A. G. Holloway the sum of \$1,169.50; that of said sum of \$1,169.50, to wit, \$412.50, be and the same is hereby declared a special lien on all the crops raised on said premises for the year commencing March 1, 1886, and ending March 1, 1887, and that special execution issue therefor. It is further ordered that all costs and expenses be first paid before any other sums are paid."

It appears from the bill of exceptions that the case having been regularly reached and called for trial, the defendant John M. Holloway and his attorneys were absent; that on the second day after the trial, the said defendant filed his motion for a new trial, which being overruled, he filed his application and affidavit for an appeal, and appeal was allowed to this court, and his counsel insist that the case is properly here for review, on the ground that there is a final judgment for rent herein with an order for an execution to issue. Appeals can only be taken from a final judgment either under the general practice act, or the statute regulating procedure in cases of partition: R. S. 1879, secs. 3391, 3710. In a partition suit the order of sale is not a final judgment from which an appeal will lie: *Turpin v. Turpin*, 88 Mo. 337; *Murray v. Yates*, 73 Id. 13.

"The statutory mode of partition found in our revised laws

has never been supposed to divest courts of chancery of their jurisdiction. Though law and equity are now blended, yet the cases in which chancery formerly had jurisdiction are cognizable in our courts, according to the mode of procedure now in use": *Spitts v. Wells*, 18 Mo. 468. The circuit court is vested with all the jurisdiction and power that a court of chancery ever had in partition suits. The mode of procedure in the exercise of that jurisdiction, as well as the mode to be pursued to obtain a review of its action by an appellate court, is, however, regulated by statute. As incident to the exercise of its chancery jurisdiction to make partition of real estate, in order to do complete justice and avoid a multiplicity of suits, it will take an account of the mesne rents and profits in perception by one tenant in common to the exclusion of the other, and of money paid to remove an encumbrance on the common property by one of the tenants: *Freeman on Cotenancy and Partition*, 2d ed., secs. 425, 512; *Story's Eq. Jur.*, secs. 655, 466; *Obert v. Obert*, 10 N. J. Eq. 98; *Scantlin v. Allison*, 32 Kan. 376; *Leach v. Beattie*, 33 Vt. 195; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Hill v. Fulbrook*, Jacob, 574; *Bowles v. Bowles*, 80 Ky. 529.

And where, as in this case, one co-tenant is in receipt of all the rents and profits, and in the exclusive use and enjoyment of the whole premises, refusing to let his co-tenant in, and such ousted co-tenant has paid money to relieve the common property of encumbrances in whole or in part, the court will declare a charge in favor of such ousted co-tenant for the amount of his share of such rents and profits, and for the amount such ousting co-tenant ought to have contributed in discharge or reduction of the encumbrance on the share of such tenant in the common property, to be paid out of the proceeds of the sale of the property in partition, before division thereof is made between the co-tenants according to their respective rights and interests in the premises: *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Scantlin v. Allison*, 32 Kan. 376; *Bowles v. Bowles*, 80 Ky. 529; *Freeman on Cotenancy and Partition*, sec. 512; *Story's Eq. Jur.* 655. "When a court of equity once acquires jurisdiction, it will not relax its grasp upon the *res* until it shall have avoided a multiplicity of suits by doing full, adequate, and complete justice": *Real Estate Savings Inst. v. Collonious*, 63 Mo. 290, and cases cited.

This suit was begun October 13, 1885. The petition alleges that the rental value of the premises for the year 1885 was

one thousand dollars. The rent accruing for that year would have been earned on the 1st of March, 1886; the allegation is equivalent to an averment that the annual rents and profits of the premises is one thousand dollars, and the substance of the remainder of the averment is, that the defendant John M. Holloway is in the exclusive reception of such rents and profits, and refuses to allow plaintiff any part thereof. This allegation is not so certain and definite as it might have been, "that the defendant had excluded the plaintiffs from the joint occupancy of the land"; but if the defendant desired to take advantage of such uncertainty, he should have done so by a timely motion to make it more definite and certain, instead of aiding it by the express averment that "he (the defendant) is in the actual and exclusive possession of the premises, was at and has been ever since the institution of this suit, and that the said S. A. G. Holloway has no possession, right, title, interest, or estate in said land."

On the pleadings, the court was authorized to find (the evidence warranting it) the value of the rents and profits (13 Gratt. 653), and charge them upon defendant's share of the proceeds of the sale of the premises from the time of his ouster of his co-tenant until the day of the sale. Within these limits the defendant would have no right to complain of the interlocutory finding and order. As to so much of it as declares the sum of \$412.50 a special lien on all the crops raised on said premises for the year commencing March 1, 1886, and ending March 1, 1887, and ordering that a special execution issue therefor, there is no judgment to support such an execution, and we know of no law authorizing the court to declare such a lien. That part of the order is a nullity, and cannot have the effect of converting an otherwise interlocutory order into a final judgment, from which an appeal would lie.

While the appeal in this case must be dismissed because prematurely taken, a brief notice of the remaining points urged by counsel against the proceedings herein may obviate the necessity of another review upon final judgment. It is urged that the order of sale and partition herein shows error on its face in view of the fact found in the decree, "that said John Holloway has held possession of said real estate since March 1, 1885, and has refused to allow said plaintiffs or T. P. Holloway to enter and hold or enjoy the same or any portion thereof, and still holds the same, . . . although demand has been made to jointly occupy the same with him." And

we are cited to authorities (*Gravier v. Ivory*, 34 Mo. 522; *Lambert v. Luenthall*, 26 Id. 473; *Shaw v. Gregoine*, 41 Id. 407) in which it is in effect held that where the defendant denies the tenancy in common and alleges that he is holding the premises adversely, and establishes this defense by evidence, i. e., by disclosing an adverse title, the trial of which necessitates a resort to an action at law in ejectment, the effect will be to put an end to the partition suit, or at least to suspend further proceedings therein until the plaintiff establishes his title by an action of ejectment.

Now, while the answer does deny the tenancy in common, the defendant does not claim to be holding the premises adversely to the plaintiff, does not disclose any title in himself to the whole premises, but does disclose a legal title by warranty deed from himself in the plaintiff to an undivided half, and then attempts to show that a third person has acquired a right or title by which such legal title might be defeated, and fails to support by any evidence the averment that such third person has any such right or title. If any evidence had been introduced to support such right, the plaintiffs would not thereby have been necessarily driven to their action of ejectment. The statute makes provision for trying, in the action for partition the adverse claims of parties to the same undivided interest in real estate: R. S., sec. 3355. It is only when the defendant is in adverse possession of the whole premises, claiming title thereto, adversely to one who claims to be his co-tenant, that such co-tenant can be driven to his action of ejectment, but apart from this adverse possession alone, without show of any title to the plaintiffs' undivided interest therein, and without any evidence casting a doubt upon the plaintiffs' title thereto, could not compel a resort to ejectment: *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427; *Sedgwick and Wait on Trial of Title to Land*, 167; *Hudson v. Putney*, 14 W. Va. 561; *Lucas v. King*, 10 N. J. Eq. 277. The tendency of more recent decisions is thus stated in *Freeman on Cotenancy and Partition*, sec. 450: "The limitations attending proceedings in partition are constantly weakening, and the tendency to do full and complete justice to the parties in one action is becoming irresistible. Wherever the question has recently arisen as a new question, the answer to which the courts were free to give without consulting decisions made at an early day, when the common-law rules were more potent than at present, it has been resolved in favor of taking juris-

diction whenever the complainant shows himself seised of the requisite title, whether the lands sought to be partitioned are held adversely to him or not."

Independent of all this, the defendant in his answer discloses a fact which would authorize the exercise of jurisdiction in this case, in that the right or title charged to be in some other person than the plaintiff is not on its face a legal title, but an equitable one, to establish which it might be necessary to invoke the powers of a court of equity; and his counsel furnish an additional argument, if any were needed, in favor of such jurisdiction in this case, in the attack they make upon the finding in favor of Mrs. Holloway for the amount of the rents and profits, contending that her estate in the premises being an ordinary legal one, that the husband alone is entitled to recover the rents and profits thereof, such being the rule in ejectment, as is contended under the authorities cited. Conceding that such would be the rule in an action at law, it does not follow that in equity her right to rents and profits from her real estate, made her separate estate by statute, would not be protected and secured to her, the same as if it were her technical separate estate, and that they would not be so protected in an action at law, would, of itself, afford good ground for the interposition of equitable jurisdiction.

And if yet an additional ground should be wanting for the exercise of equitable jurisdiction, this is a chancery proceeding for the partition of an equitable estate, the legal title to the premises is in the defendant trustees, and the equitable title of one of the plaintiffs in the premises is the title attempted to be put in issue, and that may be tried in partition, when the defendant is in adverse possession: *Dameron v. Jameson*, 71 Mo. 97; *Reed v. Robertson*, 45 Id. 580.

That the cause came on for trial and was heard in its regular order under the rules of the court in which it was at issue at a time when counsel, owing to a different rule in an adjoining circuit, did not expect it to come on, in consequence of which they were not present at the trial, in the absence of misrepresentations or bad faith on the part of counsel on the other side, would afford no ground for a new trial.

The appeal herein is dismissed, and the cause stricken from the docket.

PARTITION — EQUITY. — The jurisdiction of equity in partition is undoubted, and in many cases it is indispensable: *Howey v. Goings*, 13 Ill. 95; 54 Am. Dec. 427, and note 431. And equity has exclusive jurisdiction of

suits for the partition of personal property, and that too, even though the complainant's title is denied by the defendant: *Godfrey v. White*, 60 Mich. 443; 1 Am. St. Rep. 537, and note 541. But equity will not decree partition, where the alleged titles of the parties are not clear, and much less set aside a prior partition, made in behalf of a party who has a clear title, at the instance of another party who has a doubtful and controverted title: *Hassam v. Day*, 39 Miss. 392; 77 Am. Dec. 684.

APPEAL, WHEN MAY BE TAKEN FROM AN ORDER OF COURT. — All orders made in the progress of a trial involve the merits of the action and are appealable, except such as relate merely to matters resting in the discretion of the court, or to questions of mere practice: *Starbuck v. Dunklee*, 10 Minn. 168; 88 Am. Dec. 68; such as an order denying a change of venue: *Table Mountain etc. M. Co. v. Waller's etc. Co.*, 4 Nev. 218; 97 Am. Dec. 526; or an order striking out part of defendant's answer: *Starbuck v. Dunklee*, *supra*; or an order refusing to quash an execution: *Gilman v. Contra Costa County*, 8 Cal. 52; 68 Am. Dec. 290; or an order confirming an execution sale: *Koehler v. Ball*, 2 Kan. 160; 83 Am. Dec. 451; or an order dismissing a suit: *West v. Bagley*, 12 Tex. 34; or an order appointing a receiver: *Lewis v. Campau*, 14 Mich. 458; 90 Am. Dec. 245; for an appeal lies only upon a judgment or order that may be considered final in its nature: *Gilman v. Contra Costa County*, 8 Cal. 52; 68 Am. Dec. 290; *Hoehne v. Trugillo*, 1 Col. 161; 91 Am. Dec. 703; and judgment merely for costs is not appealable: *Holt v. Wood*, 23 Tex. 474; 76 Am. Dec. 72; nor a judgment on a demurrer: *Robeson v. Roberts*, 20 Ind. 155; 83 Am. Dec. 308; nor orders of sale in partition suits: *Turpin v. Turpin*, 88 Mo. 337; *Murray v. Yates*, 73 Id. 13; nor a voluntary nonsuit: *Ewing v. Glidwell*, 3 How. (Miss.) 332; 34 Am. Dec. 96; nor interlocutory partition decrees: *Gudgell v. Mead*, 8 Mo. 53; 40 Am. Dec. 120, and note 122.

STATE v. REEVES.

[97 MISSOURI, 668.]

CRIMINAL LAW — INDICTMENT. — Motion to quash an indictment, though filed with the consent of court, and after plea of not guilty entered, but not withdrawn, will not have the effect of withdrawing such plea.

CRIMINAL LAW. — Seduction under section 1259 of the Revised Statutes of Missouri is a felony, because punishable by imprisonment in the penitentiary; and the fact that it may be punished by a lighter punishment does not rob it of its felonious attributes, nor bring it within section 1705 of such statutes, relating to prosecutions which must be commenced within one year from the time the crime was committed.

CRIMINAL LAW — SEDUCTION. — Instruction that seduction may be found upon the uncorroborated testimony of the prosecuting witness, but as to the promise of marriage there must be evidence corroborating such witness, and this may be supplied by circumstances proven in evidence, without telling the jury the circumstances which would supply the necessary support to the witness, and without defining what "corroborating" means, is erroneous under sections 1259 and 1912 of the Revised Statutes of Missouri, providing that seduction consists in seducing and debauching any unmarried female of good repute under promise of marriage, and in order to convict, the evidence of the woman as to such

promise must be corroborated to the same extent required of the principal witness in perjury. Such instruction ignores the plain statutory language.

CRIMINAL LAW — SEDUCTION. — Defendant in seduction, who admits that there was illicit intercourse, but no promise of marriage, and his testimony supports such theory, is entitled to an instruction that if the prosecuting witness willingly submitted to defendant, without any promise of marriage, he is entitled to acquittal.

CRIMINAL LAW — SEDUCTION — INSTRUCTION. — To constitute seduction under section 1259 of the Revised Statutes of Missouri, the female must be first seduced; that is, corrupted, deceived, and drawn aside from the path of virtue; and second, she must be debauched, that is, carnally known. Therefore an instruction that if defendant promised the prosecuting witness to marry her if she would permit him to have sexual intercourse with her, and she on the faith of such promise did so, etc., he is guilty, is erroneous, for the reason that it does not require that such witness should have been seduced, but simply that she should have been debauched under promise of marriage.

CRIMINAL LAW — SEDUCTION — EVIDENCE. — Where prosecution for seduction is not instituted until fifteen months after the birth of a child alleged to be the result of the illicit intercourse, the prosecuting witness may be required to answer at the trial whether the idea of prosecuting the defendant did not spring into existence upon his marriage with another, in order to ascertain her *animus* and the motives which prompted her, after so long a time had elapsed, to institute the prosecution.

Crews and Thurmond and I. W. Boulware, for the appellant.

B. G. Boone, attorney-general, for the state.

SHERWOOD, J. Indicted for the seducing and debauching, under the promise of marriage, Zerelda Hall, the defendant, put upon his trial, was found guilty, his punishment assessed at three years in the penitentiary; judgment and sentence accordingly, and he appeals to this court. For the reversal of the judgment, numerous grounds are assigned, which are to be passed upon in this opinion.

1. The motion to quash the indictment, though filed with the consent of the court, and after a plea of not guilty entered, but not withdrawn, did not have the effect of withdrawing that plea. A motion to quash is in the nature of a demurrer; it certainly occupies no higher plane; and at common law, a defendant in a prosecution for a felony might, at one and the same time, enter his plea of not guilty to the indictment and his demurrer to the sufficiency thereof, and upon the indictment being held sufficient in law, he would be triable on his pending plea of not guilty, just as if no demurrer had been interposed. And the like was true of a plea in bar or in abatement interposed at the same time with a plea of not

guilty: 1 Chitty's Crim. Law, 435, 440; 2 Hawk. P. C., c. 23, sec. 1281, c. 3, sec. 6, and cases cited. But though this was true in cases of felonies, the rule did not cover misdemeanors: *Id.* This explains the view taken in *State v. Copeland*, 2 Swan, 626, and *Hill v. State*, 2 Yerg. 248, where the offenses charged were only misdemeanors. These considerations rule the point raised against the defendant; and an eminent text-writer regards the doctrine here announced as the better one, holding, as he does, that a motion to quash is in order at any time down to the rendition of the verdict, and this without any withdrawal of pleas: 1 Bishop's Crim. Proc., sec. 762.

2. The crime charged in the indictment was, under the provisions of section 1259, Revised Statutes, a felony, because punishable by imprisonment in the penitentiary; and the fact that it might be punished by a lighter punishment does not rob it of its felonious attributes. This is well settled: *R. S.*, sec. 1676; *Johnston v. State*, 7 Mo. 183; *Ingram v. State*, 7 *Id.* 293; *State v. Green*, 66 *Id.* 632. For these reasons, the statute of limitations, section 1705, Revised Statutes, invoked by defendant, does not apply here, and the prosecution was begun in time.

3. By our statute, it is made a crime for any person, "under promise of marriage," to "seduce and debauch any unmarried female of good repute," etc.: *R. S.*, sec. 1259. And section 1912, Revised Statutes, provides that in trials for this crime, the evidence of the woman "as to such promise must be corroborated to the same extent required of the principal witness in perjury." The statutes of no other state have such stringent provisions in regard to the *quantum* of evidence necessary to convict of the crime of seduction. Thus it will readily be seen that decisions of other states authorizing convictions for that offense possess but little worth in determining how to apply such a rigid statute as ours. Resort must therefore be had to decisions and authorities respecting the crime of perjury, and no corroboration falling short of that necessary to prove that offense will suffice in prosecutions like the present one; for so the law is written.

And though the strictness of the rule requiring two witnesses in order to convict of perjury has long since been relaxed, yet it is now uniformly held that the evidence offered in corroboration of the accusing witness must at least be strongly corroborative of such witness, and something more than sufficient to overcome the oath of the prisoner and the

legal presumption of his innocence. Parker, C. J., in *Queen v. Muscot*, 10 Mod. 192, quaintly and tersely expresses the rule by saying: "Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant." See also *State v. Heed*, 57 Mo. 252; 1 Greenl. Ev., 14th ed., sec. 256, and cases cited; 2 Wharton's Crim. Law, sec. 1319, and cases cited.

Wharton, speaking of the offense of perjury, says: "The preponderance of contradictory proof must go to some one particular false statement": Wharton's Crim. Ev., sec. 387, and cases cited. In Iowa, the statute respecting the criminal offense of seduction declares that "the defendant cannot be convicted upon the testimony of the person injured unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense." In Minnesota, the language of the statute is, "but no conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence."

The statute of New York is like that of Minnesota, and under that statute it has been ruled in the last-mentioned state that the prosecutrix may be supported by "proof of circumstances which usually attend an engagement of marriage": *Armstrong v. People*, 70 N. Y. 38. Similar rulings have been made in the other states, the statutes of which have been quoted; but it is too plain for argument that to give such a construction to our own statute on the subject would be contrary to its letter, and at war with its obvious meaning. And in respect to its meaning, it must be presumed to mean just what it says: R. S., sec. 3126.

These remarks are prefatory to the consideration of the second instruction, given at the instance of the state, as follows: "The jury are instructed that they may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness; but as to the promise of marriage, there must be evidence corroborating the prosecuting witness; but this may be supplied by circumstances proven in evidence."

This instruction entirely ignores the plain statutory language that "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury." It is also faulty in other particulars: it does not designate the circumstances which would supply the necessary support to the story of the prosecutrix;

nor does it define what corroborating means. In *State v. Chyo Chiagk*, 92 Mo. 385, an instruction which told the jury that, as to "matters material to the issue," the testimony of an accomplice must be corroborated, was held erroneous in that it failed to tell them what those words meant. A similar ruling was made in *State v. Forsythe*, 89 Id. 667, where an instruction used the words "in a lawful manner," but failed to define their meaning. The instruction, in consequence of its failure in these particulars, shed no light on the subject before the jury.

4. The theory of the defendant was, that there was illicit intercourse, but no promise of marriage, and his testimony supported that theory. He had the right, therefore, to have that theory presented to the jury; this was done in the fourth instruction which he asked, declaring that "if the jury believe, from the testimony, that defendant, in the year 1886, had carnal intercourse with Zerelda Hall, and that she willingly submitted to defendant, without any promise from defendant to marry her, the verdict of the jury should be for the defendant."

5. The language of the statute upon which the indictment in this case was found, as before stated, is this: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc.: R. S., sec. 1259. Though, in common parlance, the crime made punishable by the foregoing statute is simply termed seduction, yet each of the words "seduce" and "debauch" has its appropriate meaning, and this, under the familiar rule which presumes that the legislature, in draughting a statute, employ no superfluous words, or words without a purpose. There are two steps necessary to be taken in order to consummate the crime under discussion: 1. The female must be seduced, that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted; and 2. In order to complete the offense, she must be debauched, that is, she must be carnally known, before the guilty agent becomes amenable to human laws. Thus it will be seen that a female may be seduced without being debauched, or debauched without being seduced. If Joseph Andrews had yielded to the salacious solicitations of Lady Booby as she lay naked in her bed, he would have been guilty of debauching her person, but certainly not of corrupting her mind. A similar view of the proper construction to

be given to a statute substantially identical with our own was taken in Pennsylvania, and cited with approval in *State v. Patterson*, 88 Mo. 88; 57 Am. Rep. 374.

These remarks are made in order to the consideration of the fifth instruction, given at the instance of the state, as follows: "5. If the jury believe, beyond a reasonable doubt, that the defendant, at the county of Callaway, Missouri, and within three years of the finding of the indictment, promised Zerelda Hall to marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise, and she was at the time under the age of twenty-one years, and unmarried, and of good repute, they will find defendant guilty, and assess his punishment at not less than two nor more than five years imprisonment in the penitentiary, or by a fine of not exceeding one thousand dollars and by imprisonment in the county jail not exceeding one year."

The vice of that instruction consists in not requiring the female in question to be seduced,—to be drawn aside from the path of virtue, but simply that if without any such arts and wiles as are calculated to operate upon a virtuous female, and to lead her astray, the defendant made to the prosecutrix a plain business offer that he would "marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise," that then he was guilty. No one can, with any degree of plausibility, contend that a virtuous female could be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in præsenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. This is hire or salary, not seduction. Any construction of the statute which would sanction the fifth instruction aforesaid would strike from the statute the word "seduce," and render any one guilty of a felony who should, under promise of marriage, "debauch" any unmarried female.

6. There were many circumstances connected with the trial of this cause which rendered the testimony of the prosecuting witness open to very jealous observation. The trial occurred on the 26th of November, 1888, the indictment having been found but two days previously, and the complaint was made about that time. According to her testimony, the first congress between defendant and herself occurred in December,

1886 (but what time in that month she does not state), and the result of their illicit interviews was a child fifteen months old at the date of trial. This would prove the child to have been born on the 25th of August, 1887; but the usual period of gestation, 276 to 280 days, would, according to the books, throw the date of conception into November, 1886: 2 Wharton and Stillé's Medical Jurisprudence, secs. 41, 55. But she would not designate what time in December the first amorous encounter took place; if on the fifteenth day of December, this would give but 254 days between conception and birth, even if conception took place *eo instanti*. If on the first day of December, but 269 days; and there is no pretense that the child was not fully mature when born. Granting, however, that she was in error as to the time when the initiatory step was taken when the proceedings *in limine* were had, still it taxes credulity to a great extent to believe that she would continue to believe that the defendant intended to marry her over a year after her child was born, and therefore kept silent upon the subject of the supposed wrong done her.

The foregoing remarks are only made in order to show the caution with which this cause should have been tried, considering the peculiar circumstances which surrounded it, and the great length of time which intervened between the alleged criminal act done and its prosecution begun. Full opportunity, therefore, should have been afforded to sift the witness and to test and ascertain her *animus* and the motives which prompted her, after so long a time had elapsed, to institute the present prosecution. For this reason, she should have been required to answer the question whether the idea of prosecuting the defendant did not spring into being upon his marriage to another. It is also allowable to ask similar questions in order for the jury to understand, and understand fully, the attitude of the witness, and especially of a prosecuting witness, towards the accused: *State v. Cooper*, 83 Mo. 693; 1 Wharton on Evidence, sec. 408, pp. 544, 545, 547, 549, 561; 1 Greenl. Ev., sec. 450.

Because of the errors aforesaid, the judgment should be reversed, and the cause remanded.

SEDUCTION. — What constitutes the crime of seduction under the different American statutes: See monographic note to *People v. De Fore*, 8 Am. St. Rep. 870-872. Compare sections 1259 and 1912 of the Revised Statutes, 1879, of Missouri.

SEDUCTION — EVIDENCE. — One cannot be found guilty of seduction on the uncorroborated testimony of the prosecutrix alone; and such corroboration is not found in the prior intimacy of the parties, where the only evidence of such intimacy is, that they lived in the same family for more than a year, etc. The ordinary period of gestation in the human family may be shown as a fact raising a slight natural inference as to the time when a child, born at a stated time, was begotten; but such inference is not conclusive, even in the absence of proof that the child was premature, as from sickness, accident, or otherwise: *State v. Richards*, 72 Iowa, 17. The evidence is insufficient to support a case of seduction, where it shows that plaintiff was informed by defendant before the alleged seduction took place that his object in visiting her was to procure sexual intercourse, and that she yielded to him, not because of any promise of marriage, or flattery, artifice, or deception, but because he said if she did not satisfy his wishes, he would go with other women: *Baird v. Bochner*, 72 Iowa, 318. It was error to allow the prosecutrix, in a suit for seduction under breach of promise of marriage, where the evidence was to the effect that the crime was committed in July, and thereafter till December defendant frequently had sexual intercourse with her, to show that she gave birth to a child in August of the next year, because it in no way tended to corroborate plaintiff's statement of intercourse in July, thirteen months before: *People v. Kearney*, 110 N. Y. 188.

FELONIES. — Every crime punishable with death, or by imprisonment in the state penitentiary, is a felony: *Smith v. State*, 33 Me. 48; 54 Am. Dec. 607; and this definition holds good, even though the same crime may also be punishable merely by imprisonment in the county jail or by imprisonment and fine: *Id.* For a definition of felonies, see note to *Orenshaw v. State*, 17 Am. Dec. 791-795.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

JEWELL v. GILBERT.

[64 NEW HAMPSHIRE, 13.]

OFFICIAL TITLE IS NOT TRIABLE COLLATERALLY, and cannot be attacked except in an appropriate action brought for the special purpose of establishing the legal title, in which action the officer *de facto*, being a party, will be bound by the judgment.

DEPUTY SHERIFF IS AN OFFICER DE FACTO, though his appointment is not under seal, when the statute requires it to be sealed; and the service of a writ by him as such deputy is valid.

ACTS OF AN OFFICER DE FACTO ARE VALID WHEN THEY CONCERN the public or third persons; and their validity cannot be impaired by evidence tending to overcome the presumption that he is an officer *de jure*.

ASSUMPSIT, in which an attachment was levied on certain wood by one Graham, acting as a special deputy sheriff. He was appointed for the particular occasion, and his appointment, while in writing, was not under seal, as the statute required it to be. The Grand Trunk Railway Company claimed the wood, and resisted the entry of a judgment *in rem*, on the ground that the attachment was invalid, on account of the defect in Graham's appointment.

A. S. Twitchell, A. R. Evans, and A. L. Chamberlain, for the plaintiff.

Drew, Jordan, and Carpenter, for the claimant.

DOE, C. J. "The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of

an office without being lawful officers. It was seen that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid": *State v. Carroll*, 38 Conn. 449, 467. "Upon well-settled principles, it would be inconsistent with the convenience and security of the public, and with a due regard to the rights of one acting in an official capacity under the color of and a belief in lawful authority to do so, that the validity of his acts as a justice should be disputed, or the legal effect of his election and qualification as a representative be determined, in this proceeding, to which he is not a party. The appropriate form of trying his right to exercise the office of a justice is by information in behalf of the commonwealth, or perhaps by action against him by the person injured": *Sheehan's Case*, 122 Mass. 445, 446; 23 Am. Rep. 374. "The acts of an officer, thus having color of title, are valid in respect to the rights of third persons. . . . The adoption of such a rule is necessary to prevent a failure of justice, and the great public mischief which might otherwise be justly apprehended. Besides, the officer's title to his office ought not to be determined in a collateral way": *Bucknam v. Ruggles*, 15 Mass. 180, 182; 8 Am. Dec. 98.

"It is difficult to find a stronger illustration of the application of this rule than is furnished by the case of *Fowler v. Bebee*, 9 Mass. 231, where it was held that the acts of an officer, appointed without any authority of law, could not be invalidated or inquired into in a suit between third persons. . . . The cases all recognize the rule as being founded on public policy, which does not allow the title of a person to an office to be inquired into and determined in proceedings to which he is not a party, nor the rights of third persons to be affected by illegalities or informalities in the appointment or election of public officers who are acting under color of title": *Fitchburg R. R. Co. v. Grand J. Co.*, 1 Allen, 552, 558. "No principle is better settled than that the acts of such persons

are valid when they concern the public, or the rights of third persons. . . . It would be impossible to maintain the supremacy of the laws, if individuals were at liberty, in this collateral manner, to question the authority of those who, in fact, hold public offices under color of legal title": *People v. White*, 24 Wend. 520, 525. "In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a *de facto* public officer to exercise the powers of his office cannot be investigated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officer": Morawetz on Corporations, 2d ed., sec. 640.

In the reign of Henry VI., "the house of York asserted their dormant title; and after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom, by confirming all honors conferred and all acts done by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edward IV., c. 1, the three Henrys are styled 'late kings of England successively in dede, and not of ryght.' And in all the charters which I have met with of King Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them *nuper de facto, et non de jure, reges Angliæ*": 1 Bla. Com. 204.

"When an unjust conqueror, or any other usurper, having invaded the kingdom, on the people submitting to him, and by a voluntary homage acknowledging him for their sovereign, he is in possession of their regality. Other nations, as having no right to concern themselves in the domestic affairs of this nation, or to interfere in its government, are to abide by its judgment and conform to the possession; therefore they may treat of a peace with the usurper, and conclude it with him. Herein they do not injure the right of the lawful sovereign; it is not their concern to examine and judge of this right; they leave it as it is, and in their transactions with this kingdom, attach themselves solely to the possession, according to their own right and that of the state whose sovereignty is contested": Vattel's Law of Nations, b. 4, sec. 14.

"A new state springing into existence does not require the recognition of other states to confirm its internal sovereignty. The existence of the state *de facto* is sufficient in this respect to establish its sovereignty *de jure*. It is a state because it exists. . . . The external sovereignty of any state, on the other hand, may require recognition by other states in order to render it perfect and complete. . . . Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other states may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy": Wheaton's International Law, 8th ed., secs. 21, 23, 27, note; 1 Kent's Com. 24, 25, 167; *Kennett v. Chambers*, 14 How. 38, 47; *Prize Cases*, 2 Black, 635.

In *Luther v. Borden*, 7 How. 1, the plaintiff offered to prove that the Dorr government was lawfully established in Rhode Island in May, 1842, and was the state government *de jure* until May, 1843; and he contended that the charter government, which existed *de facto*, having no legal existence during that year, could not authorize the defendants to break and enter the plaintiff's house in order to arrest him. "If this court," says Taney, C. J. (p. 38), "is authorized to enter upon this inquiry, as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals." "Sir Matthew Hale," says Woodbury, J. (p. 57), "after much hesitation, at last consented to preside on the bench in administering the laws between private parties under a government established and recognized by other governments, and in full possession *de facto* of the records and power of the kingdom, but without feeling satisfied on inquiry, as a judicial question, into its legal rights. Cromwell had 'gotten possession of the government,' and expressed a willingness 'to rule according to the laws of the land.' . . . And this, Hale thought, justified him

in acting as judge: Hale's History of the Common Law, p. 14, preface. For a like reason, though the power of Cromwell was soon after overturned, and Charles the Second restored, the judicial decisions under the former remained unmolested on this account, and the judiciary went on as before, still looking only to the *de facto* government for the time being. Grotius virtually holds the like doctrine: B. 1, c. 4, sec. 20, and b. 2, c. 13. sec. 11. Such was the case, likewise, over most of this country, after the Declaration of Independence, till the acknowledgment of it by England in 1783: 3 Story's Commentary on Constitution, secs. 214, 215. And such is believed to have been the course in France under all her dynasties and *régimes* during the last half-century."

"The legislature of Texas," in 1862, "constituted one of the departments of a state government established in hostility to the constitution of the United States. It cannot be regarded, therefore, in the courts of the United States as a lawful legislature, or its acts as lawful acts. And yet it is an historical fact that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas had been a separate state, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government; and its acts during the period of its existence as such would be effectual, and in almost all respects valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States. It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens,

and other acts of like nature, must in general be regarded as invalid and void": *Texas v. White*, 7 Wall. 700, 732.

In *Despatch Line v. Bellamy Co.*, 12 N. H. 205, 210, 223, 37 Am. Dec. 203, one ground on which the plaintiff contested the validity of a mortgage executed by Palmer (who was a director, and assumed to act as the agent of the defendant company) was, that the election of Emery as a director was illegal, because he was not a stockholder. The mortgage was made in pursuance of what purported to be a record of a vote of the directors passed by Palmer and Emery when they met on their private business. Palmer told Emery he wanted to make a mortgage of the company's property. Emery replied that he could not act, never having had any stock; but Palmer said he was chosen a director. Emery at last said he had "no objection to look on"; and at Palmer's request, he wrote a form for a vote authorizing the mortgage. The court say, if the election of Emery "had been by a municipal corporation coming into office under color of an election, he would have been an officer *de facto*, and his acts valid so far as third persons had an interest in them. And the regularity of the election could not in such case be inquired into, except in some proceeding to which he was a party: *Tucker v. Aiken*, 7 N. H. 131, 135, and cases cited. As a director of a private corporation, although called in common parlance an officer of the corporation, he is perhaps not technically to be considered an officer *de facto*. He is one of the agents elected by a vote of the corporation for the management of its affairs, or some of them. But a similar rule must prevail in relation to the effect of his acts so far as the corporation have held him out as an agent, and third persons have confided in his acts done within the scope of the authority he appeared to possess": *Morawetz on Corporations*, 2d ed., secs. 543 a, 637-640.

Irregular corporate "elections are voidable only, and not void. These directors at most are irregularly chosen. They are in under color of an election, and their acts, so long as they retain their offices, are binding. The legality of their election cannot be brought collaterally in question, but proceedings should be instituted for the express purpose of trying it, and of evicting them": *Hughes v. Parker*, 20 N. H. 58, 72; *Nashua Ins. Co. v. Moore*, 55 Id. 48. There may be *de facto* corporations (*Morawetz on Corporations*, secs. 696 a, 710, 711, 745-778, 1002, 1008, 1015, 1030), *de facto* school and schoolmasters (*Kidder v. Chellis*, 59 N. H. 473, 475, 476), and *de*

facto school-houses: *Chapin v. School District*, 30 Id. 25, 31. A deed without a seal may be color of title: *Farrar v. Fessenden*, 39 Id. 268, 280.

"The selectmen, who commit the list of taxes to the collector, may have, it is true, more knowledge of the circumstances under which he was chosen and came into office than individuals ordinarily have respecting the particular circumstances attending the appointment of a sheriff or his deputy; but still it may impose quite as great a hardship to require them to judge at their peril of the legal validity of those proceedings, and make them answerable personally for irregularities which did not originate with them, which they could not control, and respecting the legality of which they have but inadequate means of forming an opinion. If the town proceeds to elect, their duty requires them to commit the list of taxes to the collector chosen, if the election be legal, and they have not the power to try the legality of the election, and to enter a judgment of ouster. If they are required to judge of the validity of the proceedings, they must do so without trial, and at their own peril if they mistake": *Tucker v. Aiken*, 7 N. H. 113, 132.

In that case the election of Stowell as tax collector of Derry was held to be illegal "because the office of collector was set up at auction, and the lowest bidder elected." If the selectmen could have legally appointed a collector on the ground that the election being illegal the office was vacant (Act of February 8, 1791, sec. 8), they were not bound, of their own motion, to make an appointment. They could not judicially try, and they were not bound to decide without trial, the question of Stowell's title. Their right to treat him as a collector *de facto*, and to rely upon his colorable title in committing to him the list of taxes, was not derived from their inadequate means of forming an opinion of the legality of the election. Evidence that they were learned in the law, were aware of all the facts, and knew his election was illegal, would have been inadmissible. If the judges who decided that case in 1834 had been selectmen of Derry the next year, had been present when the office of collector was again sold at auction, and when the lowest bidder was again illegally elected, they could have legally employed him as collector. In relation to a vast number of official acts in the confederate states, the *de facto* rule does not discriminate in favor of those who thought the government of those states was legally established, or against

those who entertained the contrary opinion. If A and B claim the office of register of deeds, B having color of title, and both having knowledge that the legal title is in A, B's recording a deed in which A is grantee is not invalidated by that knowledge, or by A's prosecution of a suit against B for the office when he employed him to make the record. A is protected against a collateral contestation of the colorable title which he directly and successfully attacks by process of law. In such a case the safety of every grantee does not depend upon his belief in the legality of the register's election, or upon the register's ignorance of an electoral matter of law or fact, or upon an error in the register's opinion on such a subject.

The assessment and collection of an illegal tax may be an official duty: *School District v. Carr*, 63 N. H. 201, 205; *Gove v. Newton*, 58 Id. 359; *Bell v. Railroad Co.*, 4 Wall. 598. The safety of society requires the police to act with alacrity upon a merely apparent state of things: *O'Connor v. Bucklin*, 59 N. H. 589, 591. The necessity of safe reliance on what is apparent though unreal authorizes an unofficial use of force upon an appearance of a danger that does not exist: *Aldrich v. Wright*, 53 Id. 398; 16 Am. Rep. 339. While generalization is dangerous, the judicial acceptance of the application that has been made of a broad principle to the narrow facts of particular cases, as a full exposition of it, may be a repeal of a large part of a salutary provision of law, and an enactment of a contrary provision in its place.

An office may be held *de facto* by a person whose legal incapacity to hold it is imposed upon him by a prohibitory provision of the constitution: *Sheehan's Case*, 122 Mass. 445; 23 Am. Rep. 574; *Tyler v. Flanders*, 58 N. H. 371. His disability may arise from a fact that is not apparent. But the principle that forbids a collateral inquiry into the validity of an appointment or election has a broader foundation than a latent defect discoverable only in extraneous evidence. A colorable appointment may be made by a body or person whose total lack of appointing power is matter of law. An unconstitutional statute, void on its face, can give color of official title. A person called in on a single occasion to exercise a power which the void statute purports to confer upon him may be an officer *de facto*, whose title cannot be assailed collaterally: *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409. If the appointment of Graham to the constitutional office of special deputy had been under seal, but the statutory provision under

which it was made had been unconstitutional and void, he would have been a deputy *de facto*, and his authority could not have been questioned in this suit; and for the purposes of this suit, whatever may be the efficacy of a seal, a failure to comply with a statute requiring it would not be a greater flaw than the invalidity of the statute. If the law required a seal, the want of it is a legal and technical defect that would be no more apparent to people in general than the unconstitutionality of the law.

By the general rule, official title is not triable collaterally, a colorable title is indisputable when it ought not to be disputed, and it ought not to be attacked except in an appropriate action brought for the special purpose of establishing the legal title, in which action the officer *de facto*, being a party, will be bound by the judgment. The impracticability of preventing the service of this plaintiff's writ by judgment of ouster in a *quo warranto* against Graham is no cause for trying the validity of his appointment in this suit. The sheriff "is responsible for the official conduct of his deputies. He shall, by himself or his deputies, serve and execute, in his county, all writs and other precepts to him directed": Gen. Laws, c. 216, secs. 2, 3. The sheriff signed the writing specifically purporting to authorize Graham to serve the writ; and for what was done in pursuance of that writing the sheriff was responsible, whether Graham was his agent *de facto* and *de jure*, or only *de facto*. Graham's official claim having begun and ended with the service of this writ, there is now no need of an opportunity to contest his claim in a *quo warranto*: See cases cited in *Attorney-General v. Megin*, 63 N. H. 378. If anything he did would have been wrongful with a seal on his warrant, it was wrongful without a seal. If with a seal his attachment would have been rightful, there was no reason why the plaintiff should not safely rely upon his apparent authority to make it. Without a seal, his appointment was apparent authority within the meaning of the *de facto* rule. That rule, being a law of justice and reason, and not an arbitrary ordinance enacted by a court, does not exclude the learned or the unlearned from its protection, and did not require the plaintiff to try Graham's appointment by the test of such authority as would be apparent to the few who enjoy the advantage of a legal education.

The theory that proof of a person's being an officer *de facto* is *prima facie* evidence of his being an officer *de jure*, and

that his authority is disproved by evidence that he is not an officer *de jure* (*Pierce v. Richardson*, 37 N. H. 306, 309), may be a rule of evidence in some cases (*Doe v. Young*, 8 Q. B. 63; *Doe v. Barnes*, 8 Id. 1037; *McMahon v. Lennard*, 6 H. L. Cas. 970, 1000, 1011; *King v. Hollond*, 5 Term Rep. 607, 623); but it is not generally applicable to cases in which such person is not a party. The *de facto* principle is not a mere rule of evidence in judicial trials. It invests an act of a *de facto* officer with a practical validity that is indispensable for the safe transaction of a great variety of business. "The acts of an officer *de facto* are valid when they concern the public or the rights of third persons": *Prescott v. Hayes*, 42 N. H. 56, 58. The original right of this plaintiff was not to introduce either *prima facie* or conclusive evidence on a collateral trial of the legality of Graham's official title, but to have a valid attachment made by his exercise of his apparent authority, whether his appointment was legal or illegal. The question whether a seal was necessary to make him a deputy *de jure* (Gen. Laws, c. 216, secs. 1, 2; *Davis v. Clements*, 2 N. H. 390; *Thompson v. Fellows*, 21 Id. 425) need not be considered.

Objection overruled.

OFFICE AND OFFICERS — RIGHT TO THE OFFICE OF CIRCUIT JUDGE CANNOT BE QUESTIONED IN A COLLATERAL PROCEEDING: *Keith v. State*, 49 Ark. 439; nor can the right to the office of road commissioner be collaterally questioned: *Clark v. Easton*, 148 Mass. 43; nor can the authority of any *de facto* officer be inquired into collaterally: *Baker v. State*, 69 Wis. 32.

OFFICE AND OFFICERS. — AN OFFICER DE FACTO IS ONE who exercises the duties of an office under color of title by appointment or election: *Smith v. Causler*, 119 Pa. St. 367; such an officer differs from a mere usurper, who undertakes to act without color of title, and from an officer *de jure*, who in all respects is legally qualified either by election or appointment. The law recognizes the acts of officers *de facto* as valid as against the public and third persons who have an interest in the thing done, and will not allow their acts to be collaterally attacked: *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176, and note 183, 184.

BULLARD v. BOSTON AND MAINE RAILROAD.

[64 NEW HAMPSHIRE, 27.]

EVIDENCE. — IN AN ACTION TO RECOVER FOR INJURIES SUFFERED FROM ALIGHTING FROM A TRAIN at a particular point, evidence may be received from a person other than the plaintiff that he got out of the cars several times at the same place, and when the situation was the same as when plaintiff was injured, and that it shook him up. Such evidence is admissible, because it tends to show that the defendant was negligent in not providing a platform, and that passengers left the trains at that place with its knowledge or permission. Evidence is also admissible in such action to show that the conductor generally required passengers for that station to take seats in the rear car, and that the taking of such seats would compel them to alight at the place where plaintiff was injured.

LIABILITY OF RAILWAY COMPANY FOR INJURIES SUFFERED BY PLAINTIFF IN ALIGHTING AT A PLACE OTHER THAN THE PLATFORM. — A nonsuit is properly refused in an action against a railway company for injuries sustained in alighting from its cars, when there is evidence tending to show that the plaintiff alighted at a place which she knew to be a bad one, but that the car in which she was riding was stopped at that place; that the conductor had assisted her to alight at the same place a short time before; that she was in that car by the conductor's direction; that passengers were not allowed to go forward from one car to another in leaving trains, and were accustomed to leave the train at the same place.

STATEMENT BY COUNSEL OF A FACT NOT IN EVIDENCE will entitle his adversary to a new trial, though on exception being taken to the statement the court sustained the exception, and instructed the jury to disregard the statement, and the counsel said "he would take it all back," unless it appears from the record that the decision of the jury was not affected by the admitted wrong.

CASE for injuries suffered by the plaintiff at Newton Junction. For three weeks prior to the accident complained of the plaintiff had passed daily over defendant's road between Newton Junction and Haverhill, Massachusetts. She was returning from Haverhill, and took the rear car by the direction of defendant's conductor. The train was so stopped that the car in which she was did not reach the platform. The distance from the lower step to the ground was about three feet; the ground was level and sandy, and the train usually stopped but from thirty to forty-five seconds. She was injured by stepping or jumping from the bottom step of the car to the ground. She knew the place was a bad one at which to alight. The conductor had assisted her in alighting at the same place a short time before, and had remarked to her that it was a bad place. It was in the daytime when the accident happened. Defendant moved for a nonsuit, on the ground that

plaintiff knew the place was a bad one at which to alight, and that she was guilty of negligence in attempting to alight there. The motion was denied. Objection was made and exception taken to the admission in evidence of the testimony of one Rowell and a Mrs. Tucker. The evidence of the former was to the effect that he had alighted from the cars several times at the same place and under substantially the same circumstances as plaintiff did, and that it shook him up. Mrs. Tucker testified to the same facts as Rowell; and further, that the passengers who took trains for the station in question were usually directed by the conductor to take the rear car; that she had jumped off the train several times at the same point that plaintiff did, and felt the effects for a half hour or so. In the course of his argument to the jury, defendant's counsel called attention to the fact that a physician who had been consulted by plaintiff had not been called by her as a witness. Thereupon counsel for the plaintiff answered that he had conversed with the physician alluded to, and had been informed by him that he could not testify concerning plaintiff's condition, and on that account he had not been called as a witness. The defendant excepted to this statement, the exception was sustained by the court, and the jury were instructed to disregard the statement. Thereupon counsel for plaintiff said he "would take it all back." Verdict for plaintiff, which the defendant moved to set aside. Motion denied.

Marston and Eastman, for the plaintiff.

Copeland and Edgerly, for the defendants.

SMITH, J. 1. The testimony of Rowell was competent upon the question whether the defendants provided safe and reasonable facilities for passengers to leave their trains at this point. Evidence that other passengers were injured in leaving the train at the same place tended to show that it was negligence in the defendants not to provide a longer platform. His evidence was also competent upon the question whether passengers left the train at this place with the knowledge or permission of the defendants: *Hall v. Brown*, 58 N. H. 93; *State v. M. & L. R. R.*, 52 N. H. 528.

The testimony of Mrs. Tucker was competent upon the question whether it was negligence in the plaintiff to leave the car where she did. If her testimony was true, a passenger in the rear car for that station must choose between leaving the car at a place which might be unsuitable and being carried

beyond the point of his travel a *quasi* prisoner: *Hall v. Brown* and *State v. M. & L. R. R.*, *supra*. Her testimony that passengers taking the train at Haverhill for upper stations were usually directed by the conductor to take the rear car was competent as tending to show the usage of the road, and how the defendants regarded it as being a proper place for passengers to leave the train. And her testimony as to the effect produced upon her by jumping from the train was competent, for the same reason as similar testimony from Rowell was competent.

2. In moving for a nonsuit, it must be assumed that the truth of the plaintiff's evidence was conceded. The evidence introduced by her tended to show that the defendants stopped their train before the car in which she was riding had reached the platform; that the rear car did not ordinarily reach the platform; that the conductor had assisted her to alight at the same place a short time before; that other passengers were accustomed to leave the train at the same place; that she was in the rear car by the conductor's direction; and that passengers were not allowed to go forward from one car to another in leaving the train at stations. These facts were evidence from which the jury might find that the plaintiff exercised due care in leaving the train at a place which she knew was a bad one for alighting: *Baltimore etc. R. R. Co. v. Leapley*, 65 Md. 571; and further might find that the defendants intended she should leave at that place. *Forsyth v. Boston etc. R. R. Co.*, 103 Mass. 510, and *Frost v. Grand Trunk R'y Co.*, 10 Allen, 387, 87 Am. Dec. 668, are distinguishable from this case. In those cases there was no evidence that the defendants held out any inducement to the plaintiffs to do the acts by which they were injured. *Hulbert v. New York Cent. R. R. Co.*, 40 N. Y. 145, is more nearly in point.

3. The defendants' counsel, in his argument to the jury, commented on the fact that one of the physicians consulted by the plaintiff had not been called by her as a witness. This was fair matter of argument. The defendants could rightfully ask the jury to believe that if the physician had been called his testimony would have been unfavorable to the plaintiff. However slight the weight such an inference ought to have, the jury could not be instructed that, as a matter of law, they were bound wholly to disregard it. The case does not raise the question whether any argument could have been legally advanced in reply. No argumentative reply was made; but

the plaintiff's counsel said that the physician had not been called because he found, from conversation with him, that he had not examined the plaintiff, and could give no testimony as to her condition. If this hearsay proof of a material fact had been received from a witness, its unrevoked admission would have been corrected by a new trial. The physician conversed without the moral and legal sanction of an oath, and without the test of cross-examination. His conversation, not provable by a witness, was proved by a person not a witness, not sworn, and not subject to cross-examination. Had the plaintiff's whole case been proved in the same way, the error, although extended in fact over more ground, would not have been raised to a higher degree of illegality. If the plaintiff could retain a verdict obtained or enhanced by her counsel's unsworn assertion of inadmissible hearsay in argument, the actual wrong done the defendants would be no greater were it accomplished by other persons giving the jury the same kind of proof privately and criminally. The court had no more authority to admit the hearsay, and dispense with the oath and the opportunity for cross-examination required by law, than to render judgment without any form or pretense of trial upon a rumor casually heard in the street.

The law does not transfer the defendants' property to the plaintiff as damages without a fair trial; and in a legal sense, a trial is not fair when such statements as were made in this case have any influence favorable to the party making them. He is therefore bound to do everything necessary to be done to rectify his wrong, and restore to the trial the fairness of which he has divested it. He is legally and equitably bound to prevent his statement having any effect upon the verdict. This he cannot do without explicitly and unqualifiedly acknowledging his error, and withdrawing his remark in a manner that will go as far as any retraction can go to erase from the minds of the jury the impression his remark was calculated to make. But it is by no means certain that the jury will, at his request, disregard the fact stated. It is necessary that they should be instructed that the unsworn remark is not evidence, and can have no weight in favor of the party improperly making it. It is the duty of the wrong-doer to request such instructions. The other party does his duty when he objects to the wrong inflicted upon him, and does not allow it to be understood that he waives his objection. In spite of the fullest and frankest retraction, and the most explicit and

emphatic instructions to lay the remark entirely out of consideration, the trial may not be fair. It may not be in the power of the retracting counsel and the court to remove the prejudice. Their combined and vigorous exertions may not control the mental operations of the jury. The jury may not be able wholly to free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact, which may seem to them entitled to more respect than the rule of law that excludes it. The statement, withdrawn not because it is contrary to the fact, but because it is not a legal mode of proving the fact, may do as much damage as if it had not been withdrawn. Erroneous testimony corrected by the witness who gave it, and an erroneous ruling corrected by the judge who made it, stand on different ground.

If a party should sit as a juror in his own case, it might not be enough for his counsel to request him to ignore his own interest, and for the court to instruct him that it is his duty to do so. If all the jurors had formed a decided opinion on the merits of the case before they were impaneled, the request of counsel and the instructions of the court not to be swayed by their former convictions, or by what they had heard at their lodgings, or read in the newspapers during the trial, might not make the trial fair. After everything possible is done, the bias of interest or previous opinion may not be wholly overcome. In such cases as this, the operation of the retraction and the requested instructions can be most accurately estimated at the trial term after verdict: *Burnham v. Butler*, 58 N. H. 568; *Cole v. Boardman*, 63 Id. 580, 583. In some cases they may, and in others they may not, be effectual. Much may depend upon the sincerity and earnestness of the retractor's efforts to counteract his fault. If the trial is allowed to go on, he will be bound, after verdict in his favor, to obtain a finding that the result was not affected by his tort, and ought not to be annulled on account of it. Whether the error is such that justice seems to require the trial to be stopped, and begun anew before another jury, immediately or after a lapse of time (*Hamblett v. Hamblett*, 6 N. H. 333, 347; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 459), is ordinarily a question of fact. If the trial is broken off, or the verdict set aside, there is a question of costs. Whatever is done, indemnification is the duty of the party by whom, for a time at least, the course of justice is interrupted and perverted. He is not entitled to a discharge of the jury, a waiver of the objection, or a gain of any advantage.

In *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, the court, reversing a judgment and ordering a new trial on an exception of this kind, say: "The learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence. . . . The appellant took his exception, and his counsel now supports it by numerous cases. . . . All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case. . . . There are cases in conflict with those which support this rule. But, in the judgment of this court, the rule is supported by the weight of authority and by principle. Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence; but it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence to warrant so great a reliance on the discrimination of juries. And without notes of the evidence, it may be often difficult for juries to discriminate between the statements of fact by counsel, following the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury, and affect the verdict. . . . It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. . . . The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof." In that case, there was no retraction by counsel, and no finding of the fact of a fair trial.

In *Jacques v. B. H. R. R. Co.*, 41 Conn. 61, 19 Am. Rep. 483, the plaintiff's damages were assessed by a judge, without a jury. Certain evidence was admitted subject to the defendants' "objection, to be heard in the argument." After the

argument, this evidence "was ruled out and rejected, and no portion of it was considered by the judge, who so stated in open court when rendering his decision." The court say: "Nor is the effect of this testimony upon the mind of the judge in reaching the decision pronounced on the merits to be entirely disregarded. We cannot accede to the claim of the plaintiff that the defendants could not have been injured by this testimony, because it was ultimately rejected and ruled out. The operations of our minds are mysterious even to ourselves. We cannot always appreciate the influences which lead us to a result. No doubt the judge who tried the cause intended to disabuse his mind of any influence from this testimony. No doubt he was unconscious of being affected by it. Possibly he was not; still we do not deem it improbable that he was, especially when we look at the amount of damages assessed in the case, which seem to us unwarrantably large in view of the legitimate evidence." In *Dougherty v. Welch*, 53 Conn. 558, 560, the court say: "No man can be quite certain that he is aware of all the influences which have produced conviction. It is one thing to prevent the entry of an influence into the mind, quite another to dislodge it." But the court also say: "It would be impossible to conduct judicial investigations upon the theory that everything which reaches the ear of the trier affects his final determination of questions of fact beyond all power of resistance upon his part." Whether the final determination is thus affected is a question of fact; and in our practice, the rule is, that questions of fact are to be settled at the trial term.

In *State v. Towler*, 13 R. I. 661, 665, some of the cases are cited in which it is held that an error committed by the admission of incompetent testimony is cured by its subsequent rejection or withdrawal, if the jury are clearly directed not to regard it. "The ground of these decisions," say the court, "is, that the testimony, after being rejected or withdrawn, is no longer legally before the jury, but is out of the case, and the jury being instructed to disregard it, it is to be presumed that they follow the instruction. The defendant contends that the rule ought not to be applied in the case at bar, because the testimony was withdrawn, not as incompetent, but avowedly to remove all ground for exceptions. We think, however, that the rule does not depend on the motives which influence the withdrawal. The question is, Did the withdrawal take the testimony out of the case? If it did, it is to

be considered as if it had never been admitted. We think the withdrawal, being by consent of court, is to be regarded as the act of the court, and that in contemplation of law, it purged the case absolutely of the testimony. The defendant insists that the testimony, though withdrawn, must inevitably have had an influence on the jury, and that this influence must have been aggravated by the statement of the prosecuting attorney that he had other witnesses to reputation, which he withheld because of the defendant's objection. We have no doubt that juries are often influenced by extrinsic matters. We regret to say, too, that there is reason to think that lawyers sometimes do and say things for the purpose of producing an effect on the minds of a jury which is not legitimate. Such conduct may afford ground for new trial if there is reason to suppose the jury has been influenced by it, as, indeed, the erroneous admission of testimony, subsequently ruled out, may afford ground for a new trial if there is reason to think the jury has been influenced by it. But the true mode of getting a new trial on such ground is by petition addressed to the discretion of the court, and not by bill of exceptions; for we cannot presume that the jury has been influenced, and in a bill of exceptions, the court exercises no discretion on matters of fact, but only grants a new trial where, in point of law, some material error has been committed: *Unangst v. Kraemer*, 8 Watts & S. 391. The court does not get by a bill of exceptions the information which will enable it to exercise a judicial discretion. In the case at bar, we are informed only in regard to what occurred in the matter of the rulings which are reported for revision. For anything that appears, the evidence against the defendant, independently of the evidence of reputation, may have been utterly overwhelming, and there may be no foundation whatever for the supposition that the jury was influenced either by the evidence of reputation or by the reprehensible remarks of the prosecuting attorney."

In a capital case, if the prosecuting officer, having introduced a great amount of every kind of incompetent testimony, should at last meet repeated objection by informing the jury, expressly or by insinuation, in an observation addressed to the court, that he had a convincing mass of similar evidence of the prisoner's guilt, but would withhold it for the purpose of avoiding technical exceptions, and for the same purpose would withdraw what had been objected to, the withholding

and withdrawing might be an effective part of the state's case, and the life of the accused might be endangered by his exercising his right of objection. The law would not depend upon the motive of the prosecuting officer; but having violated the right of fair trial, and necessarily assumed the affirmative and the burden of proof on his implied plea in confession and avoidance that he had made complete amends, his apparent motive, whether avowed or inferred, might be important evidence on the question of fact raised by that plea. *State v. Towler, supra*, is an authority for a conclusive legal presumption, on a bill of exceptions in such a case, that the jury are not influenced by the illegal proceeding if they are finally instructed to disregard it, and for the rule that the defendant's remedy is a petition for a new trial. After judgment of conviction in a criminal case, a new trial may be granted on the defendant's petition, when justice has not been done, through accident, mistake, or misfortune, and a further hearing would be equitable: *Buzzell v. State*, 59 N. H. 61. In the present case, the illegal proceeding occurred during the trial, and in open court; and if a supplementary petition for a new trial is a possible remedy, it is unnecessary: *State v. Ayer*, 23 Id. 301, 320; *Allen v. Aldrich*, 29 Id. 63, 75; *State v. Knapp*, 45 Id. 148, 157-160. In our simple and convenient system of practice, if the indisputable error was harmless, that fact can be found on the plaintiff's motion at the trial term. The party violating the right of fair trial accepts the burden of presenting and proving his claim that he has made full restitution, and that the decision of the jury was not affected by his admitted wrong. On the question of influence, his acknowledgment, retraction, and apparent motives, the instructions given at his request, and the verdict, are evidence, but do not shift the burden of proof; that burden is not to be unjustly thrown upon the other party by putting him to a petition for a new trial; nor is his exception unjustly overruled by a conclusive legal presumption as to the effect of instructions. If a perfect reparation of the violated right is not found as a fact, the injured party remains entitled to redress; and neither on exception nor on petition can the fact be falsely found by an inference of law. A discretionary power of compelling him to submit to an unfair trial is not vested in the court. What is called judicial discretion in such a case is a performance of the duty of correctly deciding the question of fact at the trial term:

Bundy v. Hyde, 50 N. H. 116, 120; *Darling v. Westmoreland*, 52 Id. 401, 408; 13 Am. Rep. 55.

The defendant is entitled to a new trial, unless the plaintiff obtains an amendment of the record supplying the fact that has not been found. If the plaintiff desires an opportunity to move for such an amendment, the case will be continued *nisi* to await the result of a hearing on his motion.

In the case of *Perkins v. Burley*, 64 N. H. 524, it appeared that the plaintiff and his brother had, during the trial, testified in reference to important matters of fact in dispute, and that the defendant's counsel in his closing argument said that it was unfortunate that the jury was called upon to decide a case between parties that were strangers to them, and that he regretted that the jury did not live in the vicinity of plaintiff, and his father and brother, and did not know how they were regarded in the vicinity in which they lived, and that if the jury did know how they were regarded in that vicinity, he would be willing to submit the case without argument. The plaintiff's counsel objected that this was not a proper line of argument, and thereafter the defendant's counsel did not proceed any further upon that point. A verdict having been given in favor of defendant, the plaintiff moved to set it aside and for a new trial because of the remarks of defendant's counsel. This motion was sustained, on the ground that the counsel in making the statement which he did was clearly without the bounds of legitimate advocacy, and that such statement inevitably tended to prejudice the plaintiff's case, and to deprive him of that fair and impartial trial to which all parties are entitled as of right. The court further declared that, under the circumstances, it was the duty of defendant's counsel, after having made the improper statement, to explicitly and unqualifiedly acknowledge the error and withdraw his statement, and to further request the court to instruct the jury that his unsworn statement was not evidence, and could have no weight in his favor, and that as his counsel did nothing to rectify his wrong, either by retracting the statement or asking for an instruction to the jury to disregard it, the verdict must be set aside, and a new trial granted.

STATEMENTS OF COUNSEL MADE IN ARGUMENT WHICH AMOUNT TO ERROR. — Statements in the opening remarks of counsel to the jury wholly inadmissible under the issue, or statements in the closing argument admissible under the issue, but not proved under the evidence, are improper: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554. Statements outside the record, as about matters wholly foreign to the case on trial, and without any support in the evidence, calculated to operate on the prejudices of the jury, are improper, and if allowed by the court under objection, are sufficient to reverse the judgment: *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882. An argument should be arrested by the court when not supported by any evidence: *Doster v. Brown*, 25 Ga. 24; 71 Am. Dec. 153. Even though the facts argued might have been put in evidence as pertinent to the issue, but were not: *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582. Counsel cannot be permitted to use language in his argument calculated to humiliate and degrade the opposite party: *Coble v. Coble*, 79 N. C. 589; 28 Am. Rep. 338. Nor should counsel be permitted to argue against the instructions of the court, nor in any way attempt to get the jury to disregard the court's instructions: *Baltimore & O. R. R. Co. v. Boyd*, 67 Md. 32; 1 Am. St. Rep. 362, and note

368. The discretion of the court to regulate the conduct of counsel in arguing cases will not be reviewed, unless counsel is permitted against objection to make improper remarks: *Sidekum v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266. And to warrant a review by the appellate court, the action of the lower court must be preserved in a bill of exceptions: *Smith v. Wilson*, 36 Minn. 334; 1 Am. St. Rep. 669; *Railway v. Greenlee*, 70 Tex. 553. See monographic note to *McDonald v. People*, 9 Am. St. Rep. 559-570, on the misconduct of counsel in argument.

WHERE A RAILWAY TRAIN, APPROACHING A STATION AT WHICH THERE WAS A CROSSING OF RAILWAYS, stopped, as required by law, several hundred feet before reaching the station, and the name of the station was called, and plaintiff, a woman, hurriedly attempted to get off the cars, and the train starting, she fell and was injured, the railway company was not liable, it being in the daytime, no landing-place for passengers being at that place, and no one of the railway employees knowing that she was trying to alight: *Mitchell v. Chicago etc. R'y Co.*, 51 Mich. 236; 47 Am. Rep. 566.

SLEEPER v. DAVIS.

[64 NEW HAMPSHIRE, 59.]

FRAUDULENT PURCHASE OF GOODS ENTITLES THE VENDOR TO RESCIND AND TO RECOVER THE GOODS as his own by an action of replevin, or to recover their value in an action of trover.

IF A VENDEE HAS OBTAINED GOODS BY A FRAUDULENT PURCHASE, AND THEN SOLD THEM, the vendor may waive the tort and maintain *assumpsit* for the proceeds, upon the implied promise to pay for property wrongfully appropriated.

WAIVER. — SUIT AGAINST THE VENDEE OF GOODS FRAUDULENTLY PURCHASED TO RECOVER THE VALUE OF A PART OF THEM which remain in his possession does not affirm the original fraudulent purchase of the whole goods, nor preclude the vendor from recovering the remainder, in an action of replevin against a *mala fide* purchaser from the fraudulent vendee.

ACTION OF ASSUMPSIT FOR A PORTION OF GOODS OBTAINED BY A FRAUDULENT PURCHASE is not a revocation of the rescission of the contract of sale, nor a waiver of the right to sustain an action of replevin against a *mala fide* purchaser from the fraudulent vendee.

RELEASE OF AN ANTECEDENT DEBT DOES NOT ENTITLE A VENDEE to the protection due to a purchaser *bona fide* and for value; and the goods may be recovered from him in an action of replevin by the owner from whom they had been obtained through the medium of a fraudulent purchase.

REPLEVIN. The defendants' title was based on a sale made to them by Nellie Davis, in consideration of the release of an antecedent indebtedness due from her to them. Her title was acquired by a fraudulent purchase from the plaintiffs of the goods in controversy and others. After the institution of

the present action of replevin, the plaintiffs brought an action of *assumpsit* against Nellie Davis for a part of the goods remaining in her hands and not taken by the proceedings in replevin, and recovered judgment against her for the value of the goods for which the action of *assumpsit* was brought. The defendants claimed that the bringing of this latter suit was an affirmance of the original fraudulent purchase, and therefore a bar to the present action of replevin.

E. A. Hibbard and S. C. Clark, for the plaintiffs.

T. J. Whipple, for the defendants.

ALLEN, J. The fraudulent purchase of the goods by Nellie Davis entitled the plaintiffs to rescind the contract of sale and recover them as their own by an action of replevin, or their value by an action of trover. The same right existed in favor of the plaintiffs against the defendants, who purchased and took the goods of the fraudulent vendee, unless the purchase was made in good faith by the defendants relying on their vendor's apparent title, with no notice of the fraud, and for a valuable consideration paid at the time: *Bradley v. Obear*, 10 N. H. 477; *Kingsbury v. Smith*, 13 Id. 109; *Farley v. Lincoln*, 51 Id. 577; 12 Am. Rep. 182. The action of *assumpsit* against the vendee was brought after the replevin suit, and was for the price of the goods not replevied. Having rescinded the contract of sale, and not finding all the goods so as to take them in replevin, the plaintiffs might have sued in trover for the conversion of the remainder. The vendee having disposed of the goods for her own benefit, the plaintiffs might waive the tort and maintain *assumpsit* for the proceeds, not upon the original contract of sale which has been rescinded, but upon the implied promise to pay for property wrongfully appropriated: *Mann v. Locke*, 11 N. H. 248; *Smith v. Smith*, 43 Id. 536. If by the action of *assumpsit* the plaintiffs affirmed the sale to the defendants, it was only an affirmance of the sale of those goods the price of which was sought to be recovered in the suit, and did not affect the plaintiffs' right to further prosecute their suit against the defendants for the other goods taken in replevin. The action of *assumpsit* was not a revocation of the rescission of the contract of sale, nor a waiver nor a release of the right of action against the defendants for the goods replevied, and is not a good ground of defense to this suit.

The vendee of the goods had title and possession, and, be-

fore the contract was avoided for fraud, could make to an innocent purchaser for value a sale in which he would be protected against the claim of the first vendor: Benjamin on Sales, secs. 648, 649; *Kingsbury v. Smith* and *Farley v. Lincoln*, *supra*. The consideration for the defendants' purchase was an antecedent debt, claimed to be due them from the plaintiffs' vendee, and the plaintiffs claim that the purchase, for that reason, was not one for value.

The defendants, at the time of the sale to them, paid nothing. They received the goods in satisfaction of what they had before paid, and not upon the strength of any new consideration or value then parted with. The right thus acquired was not, in equity, superior to the plaintiffs' right of reclaiming the goods for fraud in the sale, and the advantage the defendants gained by their transaction could not equitably be retained against the plaintiffs. If of the two innocent parties, the plaintiffs clothed the fraudulent vendor with title and possession of the goods, on the strength of which she could, until the contract was avoided, sell to the defendants, they do not suffer by the plaintiffs' rescission of the contract of sale and recapture of the goods; for, to the extent of the value of the goods retaken, the debt which the vendee attempted to pay to the defendants would not be discharged, and to that extent they are left in the position they were in before the transaction. By the plaintiffs' recapture of their goods, the defendants lose nothing which they are entitled to retain.

In *Kingsbury v. Smith*, *supra*, the consideration for the sale of the property, of which a title was fraudulently obtained, was a debt due the purchaser, and an overcoat delivered at the time, and upon the ground that the purchaser took the property in good faith, without notice of the fraud, and that the overcoat was a sufficient consideration for the purchase, the decision was, that the purchaser was protected in his claim against that of the original vendor. It was not decided that the discharge of the debt made the purchase *bona fide*, and one for value; and there is nothing in the opinion which shows that had the debt been the sole consideration, the decision would not have been in favor of the defrauded vendor.

In other jurisdictions it has been decided that the purchaser of goods from a fraudulent vendee cannot maintain his claim to the goods against the right of the original vendor, as that of a *bona fide* purchaser for value, when the consideration of his purchase is merely the discharge of an antecedent debt:

Barnard v. Campbell, 58 N. Y. 73, 76; 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 254, 258; *Fletcher v. Drath*, 66 Mo. 126; *Poor v. Woodburn*, 25 Vt. 235; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118. The assignee of the fraudulent vendee in insolvency, taking the assignment for the benefit of the insolvent's creditors, could not maintain his right to the goods against the demand of the original owner, who by fraud had been induced to give a title: *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182; *Bussing v. Rice*, 2 Cush. 48; nor could an assignee of the fraudulent vendee in bankruptcy retain the goods against the claim of the defrauded vendor: *Donaldson v. Farwell*, 93 U. S. 631; *Montgomery v. Machine Works*, 92 Id. 257. If the defendants had given their note for the price of the goods instead of receiving them in discharge of a debt, they could not resist the plaintiffs' claim unless they had paid the note before the plaintiffs rescinded the contract: *Matson v. Melchor*, 42 Mich. 477. If they had received the goods in pledge as collateral security for their debt, or a mortgage of them for the same purpose, the pledge and mortgage could not be upheld against the plaintiffs' claim: *Poor v. Woodburn*, *supra*. If the defendants had attached the goods upon a suit for the recovery of their debt, the attachment would be no bar to the plaintiffs' right of recovery: *Bradley v. Obear*, 10 N. H. 477; *Buffington v. Gerrish*, 15 Mass. 156; 8 Am. Dec. 97; *Wiggin v. Day*, 9 Gray, 97. And if they had obtained judgment in their suit, and purchased the property at an execution sale, they could not maintain their right to it against the plaintiffs' claim: *Devoe v. Brandt*, 53 N. Y. 462, 466. If the defendants could not have maintained their right to the goods upon an attachment made to secure their debt before the rescission of the contract of sale by the plaintiffs, for reasons at least equally strong they could not receive the goods in payment of the same debt, and hold them against the plaintiffs' right of recapture in replevin. What they could not hold taken by lawful process, they cannot claim to hold when taken voluntarily with the consent of the vendee for the same purpose.

According to the terms of the agreed case, the cause must stand for trial.

Case discharged.

SALES WHERE FRAUD EXISTS ON THE PART OF VENDEE. — The right of the vendor of goods to rescind a sale for fraud on the part of the vendee is not defeated by his having obtained judgment for the price before he became cognizant of the fraud: *Kraus v. Thompson*, 30 Minn. 64; 44 Am. Rep. 182.)

Vendor may reclaim goods, obtained by fraud on the part of the vendee, against all persons except *bona fide* purchasers for value: *Atwood v. Dearborn*, 1 Allen, 483; 79 Am. Dec. 755. Vendor may maintain an action for replevin of goods which he has been induced by fraud to sell, even against a purchaser from the vendee, who was a conspirator in the fraud: *Manning v. Albee*, 14 Allen, 7; 92 Am. Dec. 736; *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182. And in order that a purchaser from a fraudulent vendee may be protected as against the vendor, he must have parted with value upon the apparent title of the wrong-doer, and his right to dispose of the property: *Barnard v. Campbell*, 58 N. Y. 73; 17 Am. Rep. 208. Though an agent purchases goods for his principal under false statements as to the principal's existing indebtedness, yet if the principal is at the time solvent, and able to pay for the goods, and has no present intent not to pay for them, there is no fraud on account of which to avoid the purchase, and the vendor cannot rescind the sale and reclaim the goods: *Mack v. Adler*, 48 Ark. 70.

LATON v. BALCOM.

[64 NEW HAMPSHIRE, 92.]

TO PRECLUDE A PERSON FROM ACQUIRING A TAX TITLE, he must be under some legal or moral obligation to pay the tax, or there must be something in his contract or fiduciary relation to the owner of the property which renders it inequitable, as between them, that he should acquire the title.

HUSBAND OF A MORTGAGEE MAY, BY PURCHASE AT A TAX SALE, acquire the title of the mortgagor; but is precluded from becoming a purchaser for his own benefit as against his wife.

WRIT of entry. One Marden was the owner of the property in 1872, at which time he executed a mortgage thereon to the wife of the defendant. Taxes were assessed to the mortgagor in the year 1880, and becoming delinquent, a sale for their collection was made by the proper officer to the defendant, to whom a tax deed issued on May 13, 1882. August 24, 1881, a levy was made under an execution in favor of the plaintiff's ancestor, upon the right of Marden to redeem the premises from the mortgage to defendant's wife. Judgment to foreclose the mortgage was entered at the May term, 1882, and plaintiff's ancestor paid the mortgage September 15, 1882.

C. H. Burns, for the plaintiff.

A. F. Stevens and C. W. Hoitt, for the defendant.

BLODGETT, J. To preclude a person from acquiring a valid tax title, he must be under some legal or moral obligation to pay the tax, or there must be something in his contract or fiduciary relation to the owner of the property which renders

it inequitable, as between them, that he should acquire the title: *Brown v. Simons*, 44 N. H. 475, 477, 478; *Woodbury v. Swan*, 59 Id. 22; *Kezer v. Clifford*, 59 Id. 208; *Blackwood v. Van Vleit*, 30 Mich. 118, 121; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Bowman v. Cockrill*, 6 Kan. 311, 336; Cooley on Taxation, 346-348. Owing the plaintiff's ancestor no duty in respect to the delinquent tax, and standing in no contract or fiduciary relation with him, there was nothing precluding the defendant from acquiring a valid title to the land in suit as against him; and there being no defect in the proceedings pertaining to the tax sale, the effect of the defendant's purchase was to extinguish the ancestor's existing title: *Eastman v. Thayer*, 60 N. H. 408, 418.

Applying the like principles, the defendant was precluded from becoming a purchaser of the land for his own benefit, as against his wife. The obligations and duties of husbands and wives to each other, both express and implied, create such relations of trust and confidence between them that neither can acquire the other's property by a clandestine payment of taxes. Such a seizure of each other's estate, alike inequitable and shocking to the moral sense, is believed to be unsupported by any adjudged case, and would be a palpable violation of the marital contract, which, from its very nature, creates a mutual right of faith in the constant regard of each for the interests and welfare of the other. In this respect husband and wife are still a legal unit; for while the legislation on which the defendant relies has greatly enlarged the property and civil rights of the wife, and materially diminished the liabilities and the powers of the husband, it has proceeded on the ground of equal right of personal liberty and of ownership and control of property, and not on the ground of dissolving or in any degree impairing the relations of trust and confidence which marriage presupposes, and which are made by the marital contract an essential part of the marital relation.

In the progress of society, juster notions of the nature of the marriage contract have obtained, and accordingly the theory of servitude formerly attaching to the *status* of the wife has been superseded by the theory of equality. Her legal existence is now recognized. She may hold property, earned, purchased, inherited, or devised, for her own benefit. She may contract and sue and be sued in her own behalf. Her civil rights are no longer subject to her husband's control.

She may exercise the right of suffrage in educational matters, and be elected to any school office. But there is nothing in the series of statutes by which her rights and privileges have gradually approximated an equality with those of her husband that abrogates the marital rights of trust and confidence incident to the relation in all stages of society. On the other hand, the existence and continuance of these relations are recognized and enforced in the statute rendering husband and wife competent witnesses for and against each other, by expressly excluding them when their testimony "would lead to a violation of marital confidence": Gen. Laws, c. 228, secs. 20, 21; *Clements v. Marston*, 52 N. H. 31; and the progress of common law has been in the same direction, in accordance with the advance of popular intelligence by which it has been molded.

The obligations, the disabilities, and the privileges inherently consequent upon the marriage union remain unchanged. The contract, stipulatory or consensual, still is "for better for worse, for richer for poorer, in sickness and in health, to love and to cherish." And although "they two are no longer one, and he that one," in respect to property, they still have interests, direct and indirect, in each other's estates, and these interests alone, like those of partners and tenants in common, are sufficient to prohibit such an adverse resort to a tax title by either as in the fair understanding of both would be a breach of marital faith. But apart from mutual interests of property, which are of but secondary importance, such a breach of faith is a legally impossible destruction of that relation of trust established by the marriage, and which society has even more interest in preserving than the parties themselves. While unjust disabilities of the wife have been removed, there are implied stipulations of the contract which each party remains justly disabled to violate.

Judgment for the plaintiff.

WHO MAY ACQUIRE TAX TITLE. — ONE WHO ENTERS UPON AND OCCUPIES LAND as a mere intruder is under no obligation to pay the taxes upon it, and may acquire title thereto under a tax deed adverse to the former owner or his grantees: *Link v. Doerfer*, 42 Wis. 391; 24 Am. Rep. 417. A tenant in possession may purchase his landlord's land at a tax sale, and such sale, if a valid one, will extinguish the landlord's title and cut off the lease: *Ferguson v. Etter*, 21 Ark. 160; 76 Am. Dec. 361. One who is under no legal or moral obligation to pay taxes on a piece of land is not precluded from purchasing at a tax sale thereof, although in possession at the time of the assessment, or when the land was sold: *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec.

94; *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403. But a purchase at a tax sale by a part owner who is liable for the taxes does not strengthen his title: *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460. And contrary to the rule in the case of *Ferguson v. Elter*, *supra*, it has been held that a tenant in possession cannot acquire his landlord's title to land by virtue of a tax sale and deed: Note to *Blake v. Howe*, 15 Am. Dec. 684-690, wherein is also a general discussion as to who may and who may not purchase at a tax sale; cases cited in note to *Venable v. Beauchamp*, 28 Am. Dec. 85. Neither a tenant in common nor a mortgagee can acquire a tax title and set it up against his co-tenant or mortgagor, as a general rule: *Mills v. Tukey*, 22 Cal. 373; 83 Am. Dec. 74.

MOORE v. PHOENIX INSURANCE COMPANY.

[64 NEW HAMPSHIRE, 140.]

WORDS "VACANT AND UNOCCUPIED," WHEN USED IN A POLICY OF INSURANCE, in connection with the idea that the insurer was stipulating against an increase in the risk, from the absence of persons from the premises insured, must be regarded as interchangeable, and equivalent in meaning. If no one lives in the house, it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove.

ASSUMPSIT on a policy of insurance on a dwelling-house, barn, and shed. Defense that the policy became void for a breach of condition that the premises should not be left vacant and unoccupied for a period of more than ten days. The policy was dated August 15, 1876. At that time the premises were occupied by one Raymond; but he left them in the latter part of the same month, leaving several articles of household furniture of inconsiderable value in the dwelling, and some hay and agricultural implements in the barn. The loss occurred December 20, 1876. The defendants requested the court to rule that the premises had become unoccupied and vacant, within the meaning of the policy; and that they were therefore entitled to a verdict. This the court declined to do, leaving the question to the jury, under an instruction that the word "vacant," as used in the policy, signified empty or devoid of furniture, and that it was for them to decide whether the buildings were vacant in that sense of the word. Verdict for plaintiff, which the defendants moved to set aside.

J. L. Foster, Ray, Drew, and Jordan, and Rand and Morse, for the plaintiff.

P. Carpenter, Aldrich and Remich, and Bingham, Mitchells, and Batchellor, for the defendants.

ALLEN, J. The defendants claim that the action cannot be maintained, because it was not commenced in this court within twelve months from the date of loss, as stipulated in the policy. The action was commenced within twelve months of the loss in the circuit court of the United States. Subsequently, after the lapse of more than twelve months, by agreement of the parties, the suit was transferred to this court. The entry of the action here was not of a new action then first commenced; it was the same action before begun in the federal court. The agreement to enter the action here and prosecute the defense was a waiver by the defendants of the limitation in the policy. The limitation was not pleaded, and this defense could not be made, except under a special plea.

The buildings were occupied at the time the insurance was effected, August 15, 1876. From August 24, 1876, to December 11th of the same year, they were not occupied. They were consumed by fire December 20, 1876. The policy contained the condition that "if the premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever within the control of the assured, without the consent of the company, . . . then, and in every such case, this policy shall be void." It seems to have been conceded at the trial that the plaintiff's buildings had been "unoccupied," within the meaning of that term as used in the policy, for a period of more than ten days. But a different meaning was given to the phrase "vacant and unoccupied"; and under instructions of the court upon the definition of the word "vacant," the jury found that the buildings were not "vacant and unoccupied" for a period of more than ten days between the date of the policy and the fire.

The meaning of the words "vacant and unoccupied," as used in the contract of insurance, is that which the parties intended to give them; and that intention is to be found from the whole instrument, the subject-matter of the contract, and the situation of the property insured. The object of the stipulation against vacancy and non-occupancy was to guard against the increased risk which arises from the absence of everybody whose duty or interest might afford some protection. In the same clause of the contract, "increase of risk" from the mode of occupation and use of the premises, and "increase of risk by any means whatever," are mentioned as

express grounds for avoiding the policy. "If the buildings shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever," is a statement in which the leading idea in the condition of forfeiture is "increase of risk," and that idea must have been intended as a part of the definition of the words "vacant and unoccupied." It was the increase of risk from the loss of care and attention of persons otherwise present which the parties intended to guard against by the stipulation of forfeiture in case of vacancy and non-occupancy for more than ten days. They intended by the words "vacant and unoccupied," as used in the policy and in the connection in which they were used, such a desertion of the premises and removal from them as would materially increase the risk.

The case of *Sleeper v. Insurance Co.*, 56 N. H. 401, sustains this construction of the words "vacant and unoccupied." In that case, the stipulation for forfeiture in the policy was: "If the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company, and consent indorsed hereon, . . . this policy shall be void." In the opinion by Smith, J., it is said: "It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites shelter to wanderers and evil-disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have some one present occupying and dwelling in the buildings, and interested to preserve the roof that shelters his family or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save, perhaps, a few articles not needed for present use, and still the premises be considered occupied. . . . I cannot say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy." And Ladd, J., in his opinion in the same case, says: "I think when the occupant of a dwelling-

house moves out with his family, taking part of his furniture and all the wearing apparel of the family, and makes the place of his abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as unoccupied—that is, vacated—according to the natural and ordinarily received import of those terms. It is the very situation against the hazards of which the defendants undertook to guard themselves by an express stipulation and condition inserted in the contract upon which the action is founded.”

In *Keith v. Insurance Co.*, 10 Allen, 228, the policy contained a provision that “if the building insured remains unoccupied more than thirty days without notice, the policy will be void.” The building was a trip-hammer shop, and had not been used for business for more than thirty days, the machinery and tools remaining there, and the plaintiff’s son going through the shop nearly every day to see if things were right. It was decided that these facts did not constitute occupancy, but that some practical use must have been made of the building; and if it remained thus, without any practical use, for the space of more than thirty days, it was, within the meaning of the policy, unoccupied, and the policy became void. And in *Ashworth v. Insurance Co.*, 112 Mass. 422, 17 Am. Rep. 117, the condition in the policy was: “If the buildings insured shall be vacated, and remain so more than thirty days without the consent of the company, the policy shall be void.” The buildings were a dwelling-house and barn. The house was only used by the plaintiff for himself and servants to take their meals in when he was carrying on a contiguous farm, and the barn was used for storing hay and tools; but no cattle were kept there. A verdict for the defendant ordered upon these facts was sustained, the decision being that the premises were vacated within the meaning of that term as used in the policy, which thereby became void. In the opinion, Colt, J., says: “Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling-place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage. The insurer has a right, by the terms of his policy, to the care and supervision which is involved in such an occupancy.” *Keith v. Insurance Co.*, *supra*, where “unoccupied” instead of “vacated” is used in the condition of forfeiture, is cited as an authority in sup-

port. If the terms "vacated" and "unoccupied," as applied to buildings, and as used in clauses of forfeiture in policies of insurance, are intended to refer to the want of some practical use for which the insured buildings were designed, and the reason for this is the increased risk arising from the lack of care and vigilance incident to such a use, then the buildings must be said to be "vacant and unoccupied," within the meaning of the contract of insurance, when there is such a removal from them as to materially increase the risk from fire.

In all the cases referred to, the terms "vacancy" and "non-occupancy" are used interchangeably, and as equivalent in meaning. "When the policy specially provides that in case the premises 'shall be left unoccupied' [*Paine v. Agricultural Ins. Co.*, 5 Thomp. & Co. 619], or 'shall remain unoccupied' [*Keith v. Insurance Co.*, *supra*], or 'shall become vacant' [*Cummins v. Insurance Co.*, 5 Hun, 554], or 'unoccupied' [*Wustum v. Insurance Co.*, 15 Wis. 138], or 'shall be vacated' " (*Ashworth v. Insurance Co.*, *supra*), the insurance shall be forfeited. "A practical occupancy, consistent with the purposes or uses for which it was insured, is intended, and an occupancy that measurably lessens the vigilance and care that would be incident to its use for such purposes is not an occupancy within the meaning of the term as thus employed": Wood on Insurance, sec. 89.

The question of vacancy and non-occupancy, and the question of increase of risk from these and other changes of circumstances, are questions of fact for the jury: *Gamwell v. Merchants' Ins. Co.*, 12 Cush. 167; *Luce v. Insurance Co.*, 105 Mass. 297; 7 Am. Rep. 522; *Williams v. Insurance Co.*, 57 N. Y. 274; *Cummins v. Insurance Co.*, 67 Id. 260; 23 Am. Rep. 111; *Robinson v. Insurance Co.*, 27 N. J. L. 34; Wood on Insurance, 439, and cases cited. But where the undisputed facts, as naturally interpreted, show vacancy and non-occupancy, and consequent increase of risk, or when there is no evidence to rebut, modify, or explain the evidence of increased danger from the change, there is no question of fact to submit to the jury, and it becomes the duty of the court to declare the verdict: *Sleeper v. Insurance Co.*, *supra*; *Ashworth v. Insurance Co.*, *supra*; *Ditmer and Pelle v. Insurance Co.*, 23 La. Ann. 458.

The defendants, at the trial, moved that a verdict be directed for them, on the ground that there was no evidence to be submitted to the jury that the insured premises were not

"vacant and unoccupied." The motion was denied, and the question of vacancy and non-occupancy was submitted to the jury, under instructions making a distinction in meaning between these terms as used in the policy, and leaving the question of vacancy to be determined upon the evidence, without reference to the question of increase of risk. Taking the meaning of the phrase "vacant and unoccupied," as used in the policy, to be such vacancy and non-occupancy as materially increased the risk, there was no evidence that the buildings insured were not "vacant and unoccupied" for a period of more than ten days, in that sense. The premises were not occupied for nearly three months, between the date of the policy and the fire. Little or no furniture of sufficient value to remove was left in the house, which was remote from habitations, five miles in one direction and two in the other. There was no person in the vicinity whose duty or interest required him to have any care over it. The house was open, some of the windows broken, some entirely gone, and it was exposed to the incursions of chance travelers, pleasure-seekers, sportsmen, and tramps. Nothing short of destruction, which subsequently came, could have added to the abandoned character of the premises and the desolation which sat upon them. The facts all point to one conclusion. There is no circumstance showing, or tending to show, that the buildings were not "vacant and unoccupied," and there was no evidence showing, or tending to show, that the risk was not increased. There is no fact that lessens or modifies the force of the facts that show increased danger. It does not alter the case that the plaintiff did not know of the vacancy and non-occupancy until the time of re-occupation. Reasonable care required that he should have known of the tenant's removal, and it was his duty to see that the terms of the contract were carried out: *Sleeper v. Insurance Co., supra.*

In his application, the plaintiff did not answer the question whether he would agree to keep the premises occupied. But this omission cannot contradict or expunge the express stipulation of the policy on the subject, and was not a waiver of it. The defendants did not consent to the non-occupancy. They were not informed of it until long after the fire, and even in the plaintiff's proof of loss he failed to give this material information. The parties could not have intended such an abandonment of the premises as the case shows, and at the same time not have intended that they would be "vacant and

unoccupied" in the sense in which those words were used in the forfeiture clause of the policy. There being no evidence competent to be submitted to the jury that the buildings were not for more than ten days after the insurance "vacant and unoccupied," and vacancy and non-occupancy being manifest from undisputed evidence, the motion of the defendants for a verdict should have been granted, and the exception to the refusal is sustained.

Judgment for the defendants.

SIGNIFICATION OF THE TERMS "VACANT AND UNOCCUPIED" AND THE LIKE EXPRESSIONS IN POLICIES OF INSURANCE. — *Construction of Insurance Policies in General.* — In construing policies of insurance, the courts are governed by the same general rules which are applicable to other instruments, and effect is to be given to the intention of the parties, to be ascertained by the same method which is employed in the interpretation of other written contracts. Thus it is said that the contract of insurance must be construed as a whole, and except in cases relating to warranties, it is the duty of the court to adopt that construction which, in its judgment, shall best correspond with the real intention of the parties: *Barton v. Home Ins. Co.*, 42 Mo. 156; 97 Am. Dec. 329; *Straus v. Imperial Fire Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; *Wells, Fargo, & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Home Ins. Co. v. Gwathmey*, 82 Va. 923. In cases involving the construction of exceptions, warranties, and conditions in policies, an elementary rule is, that the language, being that of the insurer, selected by him, and intended for his benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. The tendency of such stipulations is to narrow the range of the underwriter's principal obligation; and again, if the meaning is ambiguous, it is his own fault in not making use of more definite terms in which to express it: *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Olson v. St. Paul etc. Ins. Co.*, 35 Minn. 432; 59 Am. Rep. 333; *U. S. Mutual Accident Ass'n v. Newman*, 84 Va. 52, 59; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144; *Georgia Home Insurance Co. v. Kinnier*, 28 Gratt. 88, 104; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685. A second elementary rule is, that the language of a policy must be construed with reference to the nature of the property to which it is applied, the purposes for which such property is ordinarily used, and the manner in which it is usually kept: *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229; *Bright v. Springfield etc. Ins. Co.*, 34 Minn. 352; *Lyons v. Providence etc. Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685, and note 689.

Phrase "Vacant and Unoccupied." — The provision that a policy of insurance upon premises shall be void if the building or buildings should become "vacant and unoccupied," or that the policy shall cease to be operative during such period, is usually found in insurance contracts, and there are numerous adjudged cases giving construction to the words "vacant and unoccupied," or words of like import used in that connection. In most of these cases the general rules of construction above stated are recognized and approved, holding that effect is to be given to the intention of the parties, such intention to be ascertained from the whole instrument, the subject-matter of the contract,

and the situation of the property insured: See *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; 79 Am. Dec. 539; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Poss v. Western Assurance Co.*, 7 Lea, 704; 40 Am. Rep. 68; *Sonneborn v. Insurance Co.*, 44 N. J. L. 220; 43 Am. Rep. 365. Thus the occupancy of a dwelling, of a barn, and of a mill is in each case essentially different in its scope and character, and the construction must have reference thereto: *Sonneborn v. Insurance Co.*, 44 N. J. L. 220; 43 Am. Rep. 365; and see *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513. In the absence of any express stipulation that the policy shall become void if the premises are left vacant, etc., the policy will not be avoided: *Gambell v. Merchants' Ins. Co.*, 12 Cush. 167; *Joyce v. Maine Ins. Co.*, 45 Me. 168; 71 Am. Dec. 536; as where a building is insured simply as "occupied," by a policy conditioned to be void "if any change be made as to tenants or occupancy," the policy is not avoided by the premises becoming unoccupied: *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; 98 Am. Dec. 298; *Somerset County etc. Ins. Co. v. Usaw*, 112 Pa. St. 80; 56 Am. Rep. 307. So if vacant premises are insured, the insurer knowing or not caring that they are vacant, but a condition in the policy provides that it shall be void if the premises become vacant, etc., it must be presumed that this provision was waived, and the insurance company is estopped from taking advantage of it: *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138. The consideration of the subject is therefore limited to those cases of an express stipulation in the policy against vacancy and non-occupancy, the main object of which is to guard against the increased risk arising from the absence of every person whose duty or interest might afford some protection to the insured premises: See *Stensgaard v. National Fire Ins. Co.*, 36 Minn. 181, 182. And keeping this object in view, the stipulation is to have a reasonable interpretation, according to the ordinary acceptance of the language used: *Sleeper v. Insurance Co.*, 56 N. H. 401. In other words, it must be construed as it would be usually understood by ordinary persons reading and acting on it: *Stupetske v. Trans-Atlantic F. Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195; having respect, of course, to the situation and character of the property insured, and the ordinary incidents and contingencies affecting the use to which it and other property of like character similarly situated is subject: *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116; affirming 9 Hun, 39.

In the case of dwellings insured, a provision that the policy should become void if the house should become "vacant and unoccupied" is sometimes inserted. And there is strong authority in support of the rule that a fair and reasonable construction of the term "vacant and unoccupied" is, that the house should be without an occupant, — that is, without any person living in it: *North America F. Ins. Co. v. Zaenger*, 63 Ill. 464; *Am. Ins. Co. v. Padfield*, 78 Id. 167; *Phoenix Ins. Co. v. Tucker*, 92 Id. 64; 34 Am. Rep. 106; *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 463; *Alston v. Insurance Co.*, 80 N. C. 326; *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; to which may be added the principal case, and other cases cited in the opinion. The same construction is given to the term "vacant or unoccupied" in *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644; *Stupetske v. Trans-Atlantic F. Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; and to the term simply "unoccupied": *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; *Sonneborn v. Insurance Co.*, 44 N. J. L. 220; 43 Am. Rep. 365. But in one case where the condition was that the policy should become void if the house should become

"vacant and unoccupied," it was held that force should be given to both words, and to avoid the policy, the premises must not only be unoccupied, but also vacant; and that a house thoroughly furnished, from which the owner has removed for a season, intending to return again and resume possession, is not, in any proper sense, a vacant house: *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488. Compare *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644, holding that a dwelling-house, to be occupied, must have in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but as the place of usual return and habitual stoppage: See also *Ashworth v. Builders' etc. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; *Paine v. Ag. Ins. Co.*, 5 Thomp. & C. 619; *Hartshorne v. Ag. Ins. Co.*, 50 N. J. L. 427. And in view of the authorities generally, a house with some trifling articles of furniture in it, from which the owner or tenant has removed, with no definite intention of returning, must be regarded as "unoccupied" or "vacated," according to the natural and ordinarily received import of those words: See *Sleeper v. Insurance Co.*, 56 N. H. 401; *Hartshorne v. Ag. Ins. Co.*, 50 N. J. L. 427, and cases cited above. On the other hand, premises do not, as matter of law, become "vacant and unoccupied" by the occasional and necessary absence therefrom of the assured, his family, and servants: *O'Brien v. Commercial Ins. Co.*, 6 Jones & S. 517; *Cummins v. Ag. Ins. Co.*, 67 N. Y. 260; 23 Am. Rep. 111; *Franklin F. Ins. Co. v. Kepler*, 95 Pa. St. 492; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106. Nor does a dwelling-house become vacant or unoccupied, in the usual acceptation of such terms, when a tenant leaves it, in the ordinary course of things, for a few hours: *Laselle v. Insurance Co.*, 43 N. J. L. 468. Nor is it necessary that the whole building should be occupied, or any particular parts of it, unless so specified in the policy. If human beings lived in and made their abode in the house, this was a sufficient compliance with the warranty: *Sonneborn v. Insurance Co.*, 44 Id. 220; 43 Am. Rep. 365. Where the insured was absent from his dwelling from Wednesday until Monday to attend a funeral, during which time the house was without an occupant, it was held that such a temporary absence was not a breach of the policy: *Franklin F. Ins. Co. v. Kepler*, 95 Pa. St. 492. And where the insured building had been unoccupied, but a clerk of the insured entered two days before the fire, made repairs, and slept there two nights, it was held that the building was not "vacant, unoccupied, or not in use," within the meaning of the policy: *Stensgaard v. National F. Ins. Co.*, 36 Minn. 181. So the policy described the house as "occupied as a family residence," and provided in a subsequent clause that the policy should become void if the house should "be or become vacant or unoccupied." It ceased to be occupied as a family residence, but was occupied by one person having access to it for the purpose of caring for it, and who ate and slept there. It was held that the policy was not avoided: *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468; and see *Stupetske v. Trans-Atlantic F. Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195; *Cummins v. Ag. Ins. Co.*, 67 N. Y. 260; 23 Am. Rep. 111. And where one of the rooms continued to be occupied nightly as a sleeping apartment by a person engaged in the repair of the building, it was held that the building did not become "vacant or unoccupied" within the meaning of the policy: *Hartford F. Ins. Co. v. Smith*, 3 Col. 422. So where the owner procured an insurance on his summer dwelling, and removed from it in November, leaving it furnished, and in the care of a person residing near it, intending to reoccupy it the next spring, it was held that the dwelling was not thus "vacant and unoccupied," and the in-

insurance was not avoided: *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; 37 Am. Rep. 488. So a tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and with his servants began cleaning it and moving in goods, and were continuously so engaged during the working hours of each day until Friday evening, intending that the family should be fully domiciled there on Saturday. On Friday night the house was burned; and it was held that the policy had not become void on the ground of vacancy or non-occupancy: *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; 59 Am. Rep. 444; and see, to the same effect, *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106; *Shackleton v. Sun Fire Office etc.*, 55 Mich. 288; 54 Am. Rep. 379.

But although the presence of an occupant in the building need not be continuous and uninterrupted, yet it was held that merely using a house for the purpose of taking meals in it is not "occupancy" within the meaning of an insurance policy: *Ashworth v. Builders' etc. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; and the use of the building solely for the purpose of storing tools, jars, etc., is not a compliance with the condition against the vacancy of the building: *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99. So a tenant who had occupied a house, but had moved with his family out of it, and was taking his meals elsewhere, cannot be said to be occupying it merely because some of his furniture remained in it, and he had not surrendered the key: *Corrigan v. Connecticut F. Ins. Co.*, 122 Mass. 299; and see *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72. So where the owner left the insured building and went elsewhere to reside, taking only part of her furniture, and leaving a man in possession, with instructions to sleep in the house at night, and this man quit the premises, and several days afterward a fire occurred, no one being in the house at the time, it was held to be unoccupied, and that the policy was void: *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; and see *Hartshorne v. Ag. Ins. Co.*, 50 N. J. L. 427. The insured property was a dwelling-house occupied by a tenant, and the policy provided that it should become void if the building became "wholly or partially vacant or unoccupied." The tenant moved out, and five days afterward the property was burned. The owner, who lived one half mile distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night, and her father, who worked near, left a few tools in the house at night. It was held that the house was "vacant and unoccupied" within the meaning of the policy, and that no recovery could be had thereon: *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676. A policy provided that it should be void "if the dwelling-house hereby insured shall cease to be occupied as such." At the time of the insurance, the house was occupied by a tenant, who moved out about six o'clock on a certain evening, and the house was burned about two o'clock the next morning. It was held that the policy was void, and was not saved by the fact that the fire had actually commenced and was smoldering unobserved when the tenant moved out: *Bennett v. Ag. Ins. Co.*, 51 Conn. 504. But where the condition of the policy was that it should become void "if the dwelling-house should become vacant or unoccupied, and so remain," it was held that the mere absence of the tenant who was then occupying the building as a dwelling-house on the night of the fire did not leave the building "vacant or unoccupied" within the sense of the contract: *Laselle v. Insurance Co.*, 43 N. J. L. 468. Under such condition in a policy, it is not sufficient to avoid the policy that the insured shall allow the premises to become vacant or unoccupied, but he must allow them to "remain so." If they are suddenly vacated, the insured is bound to procure

without unreasonable delay, another tenant or occupant, and until that is done, his rights are suspended, though the policy for that reason does not become void. On the contrary, as soon as the premises are reoccupied, the insurer's liability will again attach: *Insurance Co. of North America v. Garland*, 108 Ill. 220. But a dwelling-house is not reoccupied, within the meaning of such a provision, where, having remained vacant for three months, it is then let to a tenant who, up to the time of the loss, has placed in the house implements for cleaning it, but has not otherwise occupied it: *Litch v. North British etc. Ins. Co.*, 136 Mass. 491. And where the building was destroyed by fire after having remained unoccupied for seventeen days without notice to the insurance company, it was held that there could be no recovery upon the policy: *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; and see *Ætna Ins. Co. v. Meyer*, 63 Ind. 238; *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 436. And generally, an absolute condition in a policy of fire insurance on a dwelling that the policy shall be void "if the building insured be vacated or left unoccupied," avoids the policy, although the vacation of the house results from the permanent removal of the tenant of the insured during the running of the lease, without the knowledge or consent of the landlord: *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519; *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; 35 Am. Rep. 656.

Construing the condition against vacancy and non-occupation in view of the subject-matter of the contract, it has been held that a saw-mill lying idle for several weeks for lack of water or logs did not thereby cease to be occupied during the intervals: *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 23 Am. Rep. 116; nor in such case is it a "ceasing to operate" within the meaning of a condition in the policy avoiding it, if the mill should "cease to be operated." Those words must be construed to mean a closing with the intention of ceasing operation, and not a shutting down for a few days or weeks because of the happening of events incident to conducting a mill in that locality, and which might be reasonably expected, such as the want of logs because of low water: *City Planing etc. Mill Co. v. Merchants' etc. F. Ins. Co.*, Sup. Ct. Mich., 1888. So a policy issued on a manufactory, conditioned to be void if the premises become and remain for thirty days unoccupied, or "cease to be operated," is not avoided by a temporary cessation occasioned by the prevalence of yellow fever: *Poss v. Western Assur. Co.*, 7 Lea, 704; 40 Am. Rep. 68. And a mere temporary suspension of business for the purpose of repairing, or from want of a supply of materials, is clearly not "ceasing to operate" within the meaning of the policy": *Lebanon Mut. Ins. Co. v. Leathers*, Sup. Ct. Pa., 1887; *Am. Fire Ins. Co. v. Cotton Mfg. Co.*, 125 Ill. 131. In the case last cited the building insured was a cotton factory, and the policy provided also for a forfeiture if the building should become "vacant and unoccupied." In an action to recover for a loss by fire, it appeared that work in many departments of the factory was in temporary suspension for purposes relating to supplies, etc. Most of the employees were discharged until work should be resumed, which was expected to be soon. A number of employees were, however, retained, and were engaged in and about their usual work in the factory up to and on the day of the fire. All the plant and much valuable material and some manufactured goods were in the building. One of the proprietors was either in or at the building when the fire was discovered, and came there with money to pay persons engaged as laborers about the mill. A night and day watchman were also retained, and performed their usual duties. It was held that the property was at no time before the fire "vacant and unoccupied" in the sense in which those terms

were used in the policy. And see, to the same effect, *Brighton Mfg. Co. v. Reading Fire Ins. Co.*, 33 Fed. Rep. 232. Where a building is insured as a school-house, the insurer knowing it was to be so used, it may be inferred that it was intended to be "vacant and unoccupied" as common public school-houses usually are in vacation: See *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116, 118. But where a policy containing the usual condition against vacancy was issued on premises described as a school-house, and the school was discontinued, and the building was subsequently occupied as a dwelling until April, and was then vacant until the middle of the following October, when it was burned while unoccupied, the insurance was held to be forfeited: *American Ins. Co. v. Foster*, 92 Ill. 334; 34 Am. Rep. 134.

Where the insured property was a hog-house, and the policy, by a condition therein, was to become void if the premises "become vacated by the removal of the owner or occupant," this clause was construed as intended to express nothing more than that if the owner or occupant of the whole premises, including the hog-house, removed away, the policy should be void, and that a recovery on the policy could not be defeated by the fact that the hog-house was not used for its appropriate purposes for some time prior to the loss: *Kimball v. Monarch Ins. Co.*, 70 Iowa, 514. But where the policy sued on was issued upon a dwelling-house, and a clause provided that the insurer should not be liable for any loss or damage while the premises should be "vacant or unoccupied," and the loss occurred when no one lived in the house, though some articles belonging to a recent tenant and some belonging to the insured were in it at the time, and the land on which the house was situated, and which was particularly described in the policy, was occupied at the time, it was held that the word "premises" in the policy referred to the house, and not to the land, that the house was vacant within the meaning of the policy, and that no recovery could be had in the action thereon: *Seaton v. Hawkeye Ins. Co.*, 69 Iowa, 99; and see *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 463. A condition in a policy upon a farm-house and the adjoining buildings, that if the dwelling-house insured should be unoccupied, and ceased to be occupied as a dwelling, without the consent of the insurer, then so long as it shall be so unoccupied the policy should be void, is to be construed as applicable to all the subjects of the insurance, bringing them all within its force and effect; and a compliance with its terms is requisite to the validity of the policy as to each item of property insured. In such case, the continuance of the insurance upon all the subjects thereof is dependent upon the occupation of the dwelling: *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427; the insurer has a right, by the terms of the policy, to the care and supervision which is involved in an actual use of the farm-house as a dwelling-place: *Keith v. Insurance Co.*, 10 Allen, 228; *Ashworth v. Insurance Co.*, 112 Mass. 422; 17 Am. Rep. 117. A policy, by its terms, was to become void if the premises insured should become "vacant or unoccupied," and the property consisted of distillery buildings and machinery, presumably available for no other use; but the policy prohibited such use during its term, three months, while expressly covering a carpenter's risk. The carpenter-work contemplated was completed before the end of the term, and the building then remained unoccupied until it was destroyed. It was held that, under such a provision in the policy, the insurer could not be heard to allege a forfeiture of the contract because the premises were unoccupied: *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136.

Where a policy of insurance contains a condition that if the house insured

is vacated by the owner or occupant, previous notice shall be given to the insurer of "the particulars of such vacation or removal," such condition is not complied with by a notice that the household goods will not be removed, when in fact they are substantially all carried away: *Hill v. Equitable etc. Ins. Co.*, 58 N. H. 82.

FROST v. EASTERN RAILROAD.

[64 NEW HAMPSHIRE, 220.]

STATUTE OF LIMITATIONS. — THE DISABILITY OF AN INFANT WILL SAVE HIM FROM THE OPERATION OF THE STATUTE OF LIMITATIONS, notwithstanding the next friend by whom he sues was under its disability, and could have brought the action at any time after the cause therefor accrued.

TRESPASSER ON THE PREMISES OF ANOTHER ORDINARILY ASSUMES ALL RISK OF DANGER from the condition of the premises, and cannot recover for injury happening to him, without showing that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger.

LAND-OWNER IS NOT LIABLE TO A MINOR WHO, WHILE TRESPASSING UPON THE OWNER'S PREMISES, is injured by a turn-table insecurely guarded and wrongfully set in motion by older boys who are turning and playing thereon, when the premises on which the turn-table was situated are about sixty feet from any public highway, and on land which is inclosed by a fence, and when the turn-table was fastened by a toggle which prevented its being set in motion unless the toggle was drawn by a lever, and the lever could not have been drawn and the turn-table unfastened except by the act of such older boys, or of some person other than such minor.

ACTION on the case, brought June 4, 1884, by the plaintiff, suing by his father and next friend, to recover for injuries alleged to have been suffered June 23, 1877, from the negligence of the defendants in not properly guarding and securing a turn-table situate upon their premises. A motion for nonsuit was made and denied, and thereafter the jury returned a verdict for the plaintiff.

Dodge and Caverly, and W. J. Copeland, for the plaintiff.

J. S. H. Frink and C. B. Gafney, for the defendants.

CLARK, J. The action is not barred by the statute of limitations. "Any infant, married woman, or insane person may bring any personal actions within two years after such disability is removed": Gen. Laws, c. 221, sec. 7.

As a general rule, in cases where a disability exists when the right of action accrues, the statute does not run during

the continuance of the disability, and it has not commenced to run against the plaintiff: *Pierce v. Dustin*, 24 N. H. 417; *Little v. Downing*, 37 Id. 356. It is said that the plaintiff's next friend was under no disability, that he could have brought the action at any time within six years after the right of action accrued, and therefore the statute should apply to this case. It is an answer to this suggestion that it is the infant's action, and the failure of the next friend to bring suit within six years is no bar to the plaintiff's right of action: *Wood on Limitation of Actions*, 476.

The motion for a nonsuit raises the question whether there was evidence upon which the jury could properly find a verdict for the plaintiff: *Paine v. Railway*, 58 N. H. 611. The ground of the action is, that the defendants were guilty of negligence in maintaining a turn-table insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger boys turning and playing upon it. The turn-table was situated on the defendants' land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property, and fenced. It was fastened by a toggle, which prevented its being set in motion, unless the toggle was drawn by a lever, to which was attached a switch-padlock, which, being locked, prevented the lever from being used, unless the staple was drawn. At the time of the accident, the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle, and not locked with the padlock, the turn-table could not be set in motion by boys of the age and strength of the plaintiff.

Upon these facts, we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a land-owner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 143 Mass. 287), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury, the plaintiff was using the defendants' premises as a play-ground,

without right. The turn-table was required in operating the defendants' railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers: *Aldrich v. Wright*, 53 N. H. 404; 16 Am. Rep. 339. Under these circumstances, the defendants owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfill. A land-owner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him, he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger: *Clark v. Manchester*, 62 N. H.; *State v. Railroad*, 52 Id. 528; *Sweeny v. Railroad*, 10 Allen, 368; 87 Am. Dec. 644; *Morrissey v. Railroad*, 126 Mass. 377; 30 Am. Rep. 686; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Morgan v. Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127; 21 Am. Rep. 120; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269; *Gavin v. Chicago*, 97 Ill. 66; 37 Am. Rep. 99; *Wood v. School District*, 44 Iowa, 27; *Gramlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep. 684; *Cauley v. P. C. & St. Louis R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365; *Mangam v. Atterton*, L. R. 1 Ex. 239. The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it: *Knight v. Abert*, 6 Pa. St. 472; 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession

agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike": *Nolan v. New York etc. R. R. Co.*, 53 Conn. 461.

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

Exceptions sustained.

STATUTE OF LIMITATIONS—INFANTS. — An infant, though represented by a guardian, when a cause of action accrues may maintain an action thereon at any time within four years after reaching her majority, under the Georgia code: *Grimsby v. Hudnell*, 76 Ga. 378; 2 Am. St. Rep. 46, and note 47, as to the rights of an infant *cestui que trust* as affected by the statute of limitations.

TRESPASSERS. — DAMAGES ARE NOT RECOVERABLE BY A TRESPASSER OR MERE LICENSEE who is injured by any dangerous machine or contrivance on the land or premises of another, unless such contrivance is one which the owner may not lawfully erect and use, or when the injury is inflicted willfully, or through gross negligence of the land-owner: *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and note 615; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644, and notes 652, 653. Compare *Knight v. Abert*, 6 Pa. St. 472; 47 Am. Dec. 478, and note 479, as to land-owner's liability for injuries to trespassing animals. Except at public crossings, a railway company owes no duty to a young child on its track: *Cawley v. Pittsburgh etc. R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664, and note 667-670. A municipal corporation maintaining a swing bridge in one of its streets, keeping the same safe to persons using ordinary care, is not bound to erect barriers or keep watchmen for the protection of young children playing about the same without the knowledge of their parents: *Gavin v. City of Chicago*, 97 Ill. 66; 37 Am. Rep. 99.

SMITH v. OSSIPEE VALLEY TEN CENT SAVINGS
BANK. OSSIPEE VALLEY TEN CENT SAVINGS
BANK v. SMITH.

[64 NEW HAMPSHIRE, 228.]

GIFT BY DEPOSIT OF MONEY IN SAVINGS BANK.—Deposit of money in a bank by a father in the name of his daughter, with the intention that such deposit shall take effect as a gift to her, subject to his right to the income while he lived, and to his wife's right of taking such income for her life, if she survived him, is a valid gift of such moneys to the daughter if she, upon being informed of the deposit and its purpose, assents thereto, although the father retains the deposit-book during his life to enable him to draw the income.

ASSUMPSIT by the administratrix of James Smith to recover for a deposit of moneys in the defendant bank, made by the decedent in the name of his daughter, Huldah T. Smith. There was also a second suit, in the nature of a bill of interpleader, to determine to whom the bank should make payment of such deposit. The decedent, in 1871, deposited in the name of his daughter, Huldah, \$450, and at various dates afterwards made further deposits to the same account, and withdrew various dividends. The deposit-book was issued in the name of the daughter. The father, at the time of making the deposit, made no statement to the bank with respect to his intention other than the direction that the deposit be placed in the name of his daughter. About three years after making the first deposit, he told his daughter that he had made the deposit for her, but that he should take the income while he lived, and desired that his wife, if she should survive him, should have the income during the remainder of her life. At this time he showed the deposit-book to his daughter; she took it, saw the entries in her name, and assented thereto; but the book was never delivered to her. The decedent, in 1871, executed a document intended as a will, in which he purported to give to his daughter the sum which he had deposited in the defendant bank in her name. This document failed to take effect as a will, because not sealed. It was offered in evidence in the present action for the purpose of proving that no gift of the deposit had been made to the daughter. The questions of its admissibility and legal effect were reserved for the opinion of the court.

George B. French, for the daughter.

J. Hobbs and E. A. Hibbard, for the administratrix.

BINGHAM, J. If A places money for B in a bank, taking a deposit-book for it in his name, and subsequently notifies him of the credit, and that he intended it as a gift, which B accepts, does this vest the title in him, and divest A of all title and possession of it, if he retains the deposit-book? In *Blasdel v. Locke*, 52 N. H. 238, a bill in equity by the administrator of the donor against the bank and the donee to recover a deposit on similar facts, though less favorable to the defendants, it was held "that the deposit created a trust in the bank in favor of B, and that upon information of what had been done being conveyed by A to B, and acceptance by B, her title to the money became absolute, although there was no delivery of the deposit-book." The failure to deliver the deposit-book did not make the transaction an executory instead of an executed trust and perfected gift.

In the case at bar, the father of the defendant, Huldah, deposited in the bank in her name, before her marriage, the money in controversy. He made no declaration to the bank other than to direct the deposit in his daughter's name and receive the deposit-book. He intended, however, the deposit as a gift to her, subject to his taking the income while he lived, and to his wife's taking it for her life if she survived him. He afterwards showed the deposit-book to his daughter; she saw the entry, and he informed her of the gift, and she accepted it, he retaining the book during his life to enable him to draw the income. We understand the case to find that the father intended, at the time of making the deposit, to make a present gift to his daughter, subject to the taking of the income, unless the evidence of the imperfectly executed will was in law conclusive. The will was not conclusive evidence, even if competent, on the question, and the case stands on the finding of the court on all the evidence, including the will. The administratrix of James Smith, the father, claims that the transaction was in the nature of a testamentary disposition of the property, not in accordance with the statute of wills: *Bartlett v. Remington*, 59 N. H. 365.

There is, however, a marked distinction between this case and that of *Bartlett v. Remington*, *supra*. In that case the deposit was made in the name of the person making it, for Sarah Sturoc, on the trust that the depositor was to hold the title and the power to dispose of the property so long as she lived, and then what was left was to go to Sarah. This was held to be an executory trust, not an executed one. In this case the

money was deposited in the name of a third party, the depositor intending to make a present gift of it, subject to the taking of the income. To establish a valid gift, a delivery of the subject-matter to the donee or to some person for him, so as to divest the title and possession of the donor, must be shown; and the inquiry is, whether a valid gift *in præsenti* can be made of money, subject to the right of the donor to take the income. Such a gift, we think, may be made by a proper transfer to a trustee; and the question is, whether the facts of this case present such a transfer. If A deposits money in B's name, without his knowledge, intending it as a gift, it is not perfected, as the assent of both parties is necessary: *Peirce v. Burroughs*, 58 N. H. 302. But when B is notified of the gift, and accepts it, his legal title to the money is perfected, and if not paid on demand, he may maintain his action at law to recover it. A could have no action for the money, either at law or in equity, as all title and right of possession have passed from him. Again, if A deposits money in B's name to his credit, intending it as a present gift, but to remain in the bank during the lives of A and his wife and that of the survivor, subject to the income being taken by them, the bank takes the money on the trust to hold it for the term, pay the income to A and wife, or the survivor, during the term, and at the close pay the principal sum to B, and when B is notified of the gift, and accepts it with its burdens and conditions, a title to the principal is perfected in him, subject to the equitable right of A and wife to take the income. A's title and possession, and all right to a title or the possession of the principal, is as entirely divested at the moment of the acceptance as if it were to be paid by the bank to B on demand. It is an executed, perfected gift as to A. He has delivered the money to the bank; his dominion and power to revoke are gone. His situation is not dissimilar to what it would have been had he given the money accompanied by an unqualified delivery to B, vesting the title and possession in him on B's undertaking to account to A for the income he might receive from it during the term,—the important difference being that the payment of the income to Smith and wife is secured and made through a trustee,—practically, at least, the safer way.

Just what it is necessary to do to pass the title to money through the intervention of a savings bank the authorities do not agree in the different states, and often in the same state,

and it would be a difficult task to reconcile them. The doctrine of *Blasdel v. Locke*, *supra*, is not supported in all of its positions by all of the authorities, but we see no good reasons for departing from it, and think it supports the conclusions to which we have arrived. The following authorities discuss the questions involved in this case: *Scott v. Bank*, 140 Mass. 157, 165; *Davis v. Ney*, 125 Id. 590; 28 Am. Rep. 272; *Gerish v. Institution*, 128 Mass. 159; 35 Am. Rep. 365; *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Rep. 371; *Ide v. Pierce*, 134 Mass. 260; *Eastman v. Bank*, 136 Id. 208; *Sherman v. Bank*, 138 Id. 581; *Nutt v. Morse*, 142 Id. 1; *Curtis v. Bank*, 77 Me. 151; 52 Am. Rep. 750; *Marston v. Marston*, 64 N. H. 146; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 Id. 206; *Burton v. Bank*, 52 Conn. 398; 52 Am. Rep. 602; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Millsbaugh v. Putnam*, 16 Abb. Pr. 380; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486, 489; *Howard v. Bank*, 40 Vt. 597; *Pope v. Bank*, 56 Vt. 284; 48 Am. Rep. 781; *Marcy v. Amazeen*, 61 N. H. 131; 60 Am. Rep. 320.

Decree, that the plaintiff in the bill of interpleader pay the income of the deposit to Mrs. Smith during her life, and at her death the principal to Huldah F. Emerson. In the suit at law, judgment for the defendant. The cost will be adjusted at the trial term.

GIFTS. — As to what is essential to make a valid gift *causa mortis*, see note to *Appeal of Walsh*, 9 Am. St. Rep. 87, 88; and compare the following cases: *Burton v. Bridgeport Savings Bank*, 52 Conn. 398; 52 Am. Rep. 602; *Curtis v. Portland Savings Bank*, 77 Me. 151; 52 Am. Rep. 750; *Pope v. Burlington Savings Bank*, 56 Vt. 284; 48 Am. Rep. 781, and note 787-790; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308, and note 310, 311; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447, and note 451, 453; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; all of which are more or less analogous to the principal case.

ECKSTEIN v. DOWNING.

[64 NEW HAMPSHIRE, 248.]

SPECIFIC PERFORMANCE OF A CONTRACT RESPECTING PERSONAL PROPERTY will not ordinarily be enforced in equity unless an adequate remedy at law cannot be had.

SPECIFIC PERFORMANCE WILL NOT BE DECREED OF CONTRACTS FOR THE SALE OF STOCKS IN PRIVATE CORPORATIONS where the breach of the contract is capable of exact compensation in damages. Hence specific performance was refused where the plaintiff had agreed to sell a yacht and the defendant to pay therefor a certain number of shares of stock of a designated corporation, there being no evidence tending to show that plaintiff had any wish or reason to become the owner of such stock rather than of any other stock of equal value, or that he would not have agreed to take any other stock of equal value in payment of the yacht, or a sum of money equal to that value.

SPECIFIC PERFORMANCE — MUTUALITY OF REMEDY. — The fact that one party to a contract is entitled to have a specific performance of such contract decreed by a court of equity does not entitle the adverse party to a decree of specific performance in his favor if a breach of the contract may be adequately compensated, so far as he is concerned, by the payment of a sum of money.

BILL in equity to enforce specific performance of a contract.

J. H. S. Frink and Calvin Page, W. M. Ramsey and E. H. Pendleton, for the plaintiff.

Chase and Streeter, for the defendant.

SMITH, J. The plaintiff agreed to sell to the defendant his yacht, claimed and admitted for the purpose of the question of jurisdiction to be worth six thousand dollars, for sixty shares of stock in the Abbot-Downing Company, found to be worth three thousand six hundred dollars. This executory contract, entered into August 14, 1884, was rescinded six days afterwards by the defendant's guardian. The plaintiff seeks to enforce, and the defendant resists, specific performance of the contract. Equity does not ordinarily interpose to enforce specific performance of a contract respecting personal property unless an adequate remedy at law cannot be had: *Hill v. Bank*, 44 N. H. 567, 568. If in this case the contract had been that the defendant should pay for the yacht in money, the plaintiff could not maintain a bill for specific performance without showing that his remedy by an action at law was inadequate: *Noyes v. Marsh*, 123 Mass. 286, and cases cited. His measure of damages would be the difference between the value of the property at the time of the breach of the contract and the price fixed by the contract. We do not see that the result is

different because payment was stipulated to be made in shares of a corporation. If the value of the stock be regarded as the contract price of the yacht, the question still is, How much are the plaintiff's damages by reason of the defendant's refusal to purchase his yacht?

It is not shown that an award of damages for the breach of the contract will not do exact justice between the parties. The general rule in regard to contracts for the sale of stocks may be stated to be, that specific performance will not be decreed, because such contracts are capable of exact compensation in damages: 2 Story's Eq. Jur., sec. 724. This rule is especially true of contracts for the sale of government stocks or bonds, which are always readily purchasable at their market value. Specific performance of contracts for the sale of stocks in purely private corporations, such as banking, mining, manufacturing, and commercial companies, has sometimes been decreed upon the ground that damages at law do not furnish an adequate remedy for the breach. In *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 368, 32 Am. Rep. 315, stress was put upon the fact that the controlling motive of the purchaser may have been that the real worth of the stock may consist in the prospective rise which he anticipates might follow, or that his desire was to hold the stock as a permanent investment. See also *White v. Schuyler*, 1 Abb. Pr., N. S., 300. The criterion whether there is an adequate remedy at law has been said to depend upon the fact of the purchasability in the market of the stock contracted for: 22 Am. Law Reg., N. S., 489, 500. The authorities, however, are conflicting. In *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671, decided in 1879, Payson, J., said: "I know of no instance in this state in which a court of equity has decreed specific performance of a sale of stock." In *Todd v. Taft*, 7 Allen, 371, the point that the plaintiff had an adequate remedy at law was not raised. In *Cud v. Rutter*, 1 P. Wms. 570, a decree for specific performance of a contract to deliver South Sea stock was denied, because the plaintiff might buy of any other person, and be no more out of pocket than if the stock were delivered to him according to the agreement. In *Cappur v. Harris*, Bunb. 135, the plaintiff was left to his remedy at law. But in *Nutbrown v. Thornton*, 10 Ves. 161, and in *Mason v. Armitage*, 13 Id. 37, specific performance was decreed. In *Ross v. Union Pacific R'y Co.*, Woolw. 26, Miller, J., said he saw no sound reason for any distinction between shares of the defendant company and government stocks, and

that the rule in regard to them should be the same. In *Ashe v. Johnson*, 2 Jones Eq. 149, specific performance was decreed. And see 2 Story's Eq. Jur., 13th ed., sec. 767 a, note a.

There are many other cases bearing more or less directly upon the question, of which it is unnecessary to speak in detail. We do not hold that specific performance of a contract for the sale of stock, or shares in a manufacturing corporation, cannot be decreed under any circumstances, but this case comes within the general rule that equity jurisdiction for enforcing such performance is based on a want of adequate remedy at law. The stock of the Abbot-Downing Company is not commonly offered for sale, and actual sales are very rare. The plaintiff may be unable to purchase an equal number of shares for the same price. But there is no evidence tending to show that he had any wish, or reason for wishing, to become the owner of the Abbot-Downing Company stock rather than any other stock of equal pecuniary value, or that he would not have agreed to take any other stock of equal value in payment of the yacht, or a sum of money equal to that value: 3 Parsons on Contracts, 370, 371.

The plaintiff contends that the defendant can maintain a bill for specific performance of the contract in regard to the sale of the yacht, and may therefore be compelled specifically to perform the same contract; in other words, he invokes the aid of the rule of mutuality of remedy. It is said in some of the text-books that equity interferes to decree specific performance of a contract where the remedy is mutual: 2 Story's Eq. Jur., sec. 723; Pomeroy on Specific Performance, sec. 165; Adams's Equity, 80; Batten on Specific Performance, 66. Parsons says the meaning of the rule is not very clear, nor is it easy to make a satisfactory classification of the cases in which it has been announced as the ground of decision: 3 Parsons on Contracts, 6th ed., 409, note t. It has been held in England that an infant cannot maintain a suit for specific performance of a contract, because the remedy is not mutual: *Flight v. Bolland*, 4 Russ. 298. The same reason may not exist in this state: *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408. So where the plaintiff is insolvent, or is a servant employed to perform services of trust, it has been held he cannot maintain such a bill: 3 Parsons on Contracts, 409, note t. But these are cases where the remedy is not mutual, because the parties do not stand on an equal footing.

Equity will decree performance of a contract for land, because the damages recoverable at law may not be a complete remedy for the purchaser, to whom the land may have a peculiar and special value: 2 Story's Eq. Jur., sec. 717. And the cases are numerous where the vendor has maintained a bill for the specific performance of a contract for land, and to compel payment of the purchase-money: *Ewins v. Gordon*, 49 N. H. 444. Equity compels specific performance in favor of the vendor, not on the ground of mutuality of remedy, but because compensation in damages, measured by the difference in price, as ascertained by the market value and by the contract, is not regarded as adequate indemnity for the non-fulfillment of the contract: *Jones v. Newhall*, 115 Mass. 244, 248; *Old Colony R. R. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394. In the English courts, the doctrine of equitable conversion is held to be an additional ground for exercising chancery jurisdiction to compel specific performance of contracts for the sale or purchase of land: Fry on Specific Performance, sec. 23.

The rule of mutuality of remedy is of English origin: 1 Spence's Eq. Jur. 220, note *f*; 3 Parsons on Contracts, 350, note *a*. In that country, there is no limitation upon the jurisdiction of their chancery courts, except so far as it is fixed and defined by usage. For no other reason, apparently, than the arbitrary one that the remedy should be mutual, the rule became established that either party might maintain a bill for specific performance if the other could, although the party bringing the bill could have no other relief than the recovery of the same amount of money or damages as would be recovered in a suit at law: *Hall v. Warren*, 9 Ves. 605; *Walker v. Eastern Counties R'y*, 6 Hare, 594; *Kenney v. Wexham*, 6 Madd. 355. In Massachusetts, the jurisdiction of their court to decree specific performance of a contract is limited to cases where "the parties have not a plain, adequate, and complete remedy at common law." Neither in that state nor in Pennsylvania does the English rule of mutuality of remedy seem to be followed in its fullest extent: *Jones v. Newhall*, 115 Mass. 244, 251; *Kauffman's Appeal*, 55 Pa. St. 383. It may be found upon examination that much of the obscurity in the cases upon the subject is due to the failure to recognize the difference in the chancery powers of the courts of the different states. One learned writer says the arguments in support of the rule "are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have

little or no real force and meaning": Pomeroy on Specific Performance, sec. 169, note 1; see also *Walker v. Eastern Counties Ry*, 6 Hare, 594, 602; *Kenney v. Wezham*, 6 Madd. 355, 357; *Withy v. Cottle*, 1 Sim. & St. 174; *Adderley v. Dixon*, 1 Id. 607; *Cogent v. Gibson*, 33 Beav. 557. Although equity has always existed as a part of the common law in New Hampshire (*Wells v. Pierce*, 27 N. H. 503, 512; *Penhallow v. Kimball*, 61 Id. 596, 598), it has never been held, so far as we are aware, that a party is entitled to a decree for specific performance without regard to the fact whether his remedy at law is plain, adequate, and complete, merely because the other party would be entitled to it if he should ask for it. We do not say, however, that cases may not arise where equity, upon the principle of even-handed dealing, may not afford the relief of specific performance under such circumstances. The rule appears to have been applied with greater strictness in the older than in the later decisions. "Indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but at most upon notions of expediency": Pomeroy on Specific Performance, sec. 169, note 1. A technical rule is or should be subordinate to the general inquiry whether a party requires other and better relief than a suit at law can give.

The rule, however, is far from being universal. Specific performance of contracts in regard to personal property is decreed only where the vendor stands in need of the specific relief which a court of equity only can give: *Kauffman's Appeal*, 55 Pa. St. 383; *City of Memphis v. Brown*, 20 Wall. 289. Indeed, in this respect, there is no distinction between real estate and personal estate: 2 Story's Eq. Jur., sec. 717. Hence it is a well-established rule that relief by a decree for specific performance of a contract is not a matter of right in either party, but rests in the discretion of the court: *Pickering v. Pickering*, 38 N. H. 400; *Eastman v. Plumer*, 46 Id. 464; *Wilbard v. Tayloe*, 8 Wall. 557. The discretion to be exercised, however, is not of an arbitrary and capricious character, but, in the language of Story, "that sound and reasonable discretion which governs itself so far as it may by general rules and principles, and at the same time grants or withholds relief, according to the circumstances of each particular case, when those rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down rules or principles which are of abso-

lute obligation and authority in all cases": 2 Story's Eq. Jur., sec. 742. The question of discretion is a question of fact, and the question of fact often is the adequacy of the remedy at law under the circumstances of a particular case.

Equity enforces specific performance when there is no adequate remedy at law. This is the ground of this branch of equity jurisdiction, and it is not consistent with the test of mutuality of remedy. When payment is to be made in money, mutuality of remedy is not the test for the right to this remedy; and when the exchange on one side differs neither in purpose nor reason from a sale for money, the remedy of specific performance need not be mutual. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner (*Ewins v. Gordon*, 49 N. H. 444, 457), but not necessarily enforceable on both sides by specific performance. In this case, the exchange on the side of the defendant differs neither in purpose nor reason from a sale for money. The plaintiff was benefited, not injured, by the defendant's breach of the contract. Specific performance is a remedy decreed only in case of want of adequate relief at law. Here there is no such want, and equity does not require a remedy by which the plaintiff would be injured to the amount of two thousand four hundred dollars. But if the plaintiff was injured by the breach, it is not found as a fact, nor can it be inferred as matter of law from the facts, that the plaintiff's remedy at law is not convenient and complete; and for this reason the bill cannot be maintained.

Bill dismissed.

SPECIFIC PERFORMANCE. — Specific performance of a contract to sell shares of a national bank will not be enforced where it appears that the shares were designed to give control of the bank; and it is very questionable whether such a contract would be enforced even if it were a lawful contract, and not against public policy: *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671, and note 674.

SPECIFIC PERFORMANCE OF A WRITTEN CONTRACT OF SALE at the instance of the vendor, when all that is to be done by the vendee is the payment of the money, for which the vendor may maintain an action at law, will not be enforced in equity: *Jones v. Newhall*, 115 Mass. 244; 15 Am. Rep. 97; compare note to *Old Colony R. R. Corp. v. Evans*, 66 Am. Dec. 405; note to *Adams v. Messenger*, 9 Am. St. Rep. 684.

NOYES v. BOSCAWEN.

[64 NEW HAMPSHIRE, 361.]

NEGLIGENCE OF DRIVER OF A VEHICLE IS NOT IMPUTED TO A PASSENGER THEREIN when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection.

ACTION on the case to recover from injuries suffered from a defect in the highway. The plaintiff was riding in a carriage which her brother-in-law was driving at the time the accident occurred, and it was claimed that his negligence, united with the negligence of the defendant, was the cause of the injury complained of. The court instructed the jury that if either the plaintiff or her brother-in-law, the driver, did not exercise ordinary care, and if, by the exercise of such care, the plaintiff would have escaped injury, the verdict should be for the defendants.

D. F. Dudley, for the plaintiff.

W. G. Buxton, and Chase and Streeter, for the defendants.

CLARK, J. The case raises the question, whether a person who is guilty of no personal negligence, receiving an injury while riding in the carriage of another, caused by a defect in the highway and the carelessness of the driver over whom he has no control, is prevented by the negligence of the driver from recovering against the town; whether the negligence of the driver of a carriage is a defense to an action brought by a passenger personally free from fault for the recovery of damages for an injury happening from a defective highway. Upon the question whether the negligence of the driver or manager of a carriage is imputable to a passenger, the authorities are conflicting.

In the leading English case of *Thorogood v. Bryan*, 8 Com. B. 115, a passenger in alighting from an omnibus was thrown down and injured by the negligent management of another omnibus, and it was held that an action could not be maintained against the owner of the latter, if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury. Although this case has been criticised by English judges, we are not aware that it has been overruled in the English courts; and in *Armstrong v. Lancashire and Yorkshire Ry Co.*, L. R. 10 Ex. 47, decided in 1875, it was fol-

lowed and approved. In the latter case, the plaintiff was injured by a collision of a train of the London and Northwestern Railway Company, on which he was a passenger, with some coal-cars of the defendant company. The jury found that the collision was caused by the joint negligence of the London and Northwestern company and the defendants; and it was held that the plaintiff was so far identified with the London and Northwestern company that he could not recover: 12 Moak's Eng. Rep. 508.

In this country, the doctrine of *Thorogood v. Bryan*, *supra*, has been approved and followed in some states, and in others it has been questioned and its soundness denied. The weight of authority seems to be against it. Cases supporting it are found in Wisconsin: *Houfe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 568; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; in Pennsylvania: *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Forks Township v. King*, 84 Id. 230; in Iowa: *Payne v. Chicago etc. R. R. Co.*, 39 Iowa, 523; and in Vermont: *Carlisle v. Sheldon*, 38 Vt. 440. Two Massachusetts cases are cited as supporting the doctrine: *Smith v. Smith*, 2 Pick. 621; 13 Am. Dec. 464; *Allyn v. B. & A. R. R. Co.*, 105 Mass. 77; but all that was decided in *Smith v. Smith*, *supra*, was, that one who is injured by an obstruction unlawfully placed in a highway cannot maintain an action for damages if it appears that he did not use ordinary care by which the obstruction might have been avoided; and *Allyn v. B. & A. R. R. Co.*, *supra*, merely decides that there was no evidence for the jury that the plaintiff was in the exercise of due care. The question does not arise in highway cases in Massachusetts and Maine, as it is there held that a town is not liable for an injury caused by a defect of the highway and the negligent act of a third party combined, the construction given to the statute being that no action can be maintained unless the injury arises wholly from the defect: *Rowell v. Lowell*, 7 Gray, 100; 66 Am. Dec. 464; *Shepherd v. Chelsea*, 4 Allen, 113; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Inhabitants of Fayette*, 68 Id. 152; 28 Am. Rep. 84.

The doctrine of *Thorogood v. Bryan*, *supra*, is denied in New York: *Robinson v. New York Cent. & Hudson River R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1; *Dyer v. Erie R'y Co.*, 71 N. Y. 228; in New Jersey: *Bennett v. New Jersey R. R. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *New York, Lake Erie, and Western R. R. v. Steinbrenner*, 47 N. J. L. 161, 171; 54 Am. Rep. 126; in

Ohio: *Transfer Co. v. Kelly*, 36 Ohio St. 86, 91; 38 Am. Rep. 558; in Illinois: *Wabash, St. Louis, and Pacific R'y Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; in Kentucky: *Danville etc. Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, Cincinnati, and Lexington R. R. Co. v. Case*, 9 Bush, 728; in California: *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163; and in the supreme court of the United States, in the recent case of *Little v. Hackett*, 116 U. S. 366.

The rule that the negligence of the driver or manager of a vehicle is to be treated as the negligence of a passenger, in an action by the passenger against a third party, is put upon the ground that the passenger in selecting the conveyance has placed himself in the care of the driver, and hence must be taken to be in the same position; and the driver, as to third persons, is to be so far regarded as the agent or servant of the passenger as to make the latter chargeable with the driver's negligence, and hence not entitled to recover, although he may have been free from fault himself. In *Carlisle v. Sheldon*, 38 Vt. 440, which was an action for injury to a wife, caused by a defect in the highway while riding in a carriage driven by her husband, the doctrine is stated by Kellogg, J., as follows: "The question is, whether a lack of ordinary care and prudence on the part of the husband is in law, under the circumstances of the case, a bar to a recovery for an injury to the wife when she herself was in the exercise of that degree of care, and was in no fault whatever. The wife was riding in a wagon drawn by a horse driven by her husband. She was a passenger over the highway, and she stands in no different position in respect to her rights as against the town from that which she would occupy if the driver of the vehicle in which she was carried had been, instead of her husband, one employed for that purpose. The negligence or want of ordinary care of her servant would have the same effect, and be attended with the same legal consequences, which would follow from her own negligence or want of care. If she had been a passenger in a stage-coach on this occasion, and had received the same injury, under precisely the same circumstances, although she might have had a cause of action against the proprietor for the negligence or want of care of the driver, we regard it as clear that no action could have been maintained against the town, because the proprietors and their driver would in respect to the town be treated as being her agents and servants, and their negligence or want of ordinary care

would be attended with the same consequences which would result from her own negligence and want of such care. The passenger would in respect to the town stand upon the same footing that he would if he had himself been the driver. There is nothing in the marital relation which would change the situation of the wife in respect to her husband's negligence under such circumstances, for the same consequences would have followed if the relation, instead of being that of husband and wife, had been that of parent and child, father and daughter, or master and servant, or if she had been an entire stranger, and had been carried by her husband as a passenger gratuitously, and without any expectation of reward. She was under the care of her husband, who had the custody of her person, and was responsible for her safety; and any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."

On the other hand, this doctrine is declared to be unsound, and in conflict with the principle that no one should be denied a remedy for injuries sustained without fault by him, or by a party under his control or direction; that the relation of master and servant, or principal and agent, does not exist in cases where the passenger has no control over the driver; that it is the right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant, and that no one is responsible for the negligence of another unless the latter is his servant or agent. In *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, which was the case of a person injured by a collision of the defendants' train of cars with a carriage, in which the plaintiff was riding by invitation of the owner, who was driving, and whose negligence, it was claimed, contributed to the injury, Church, C. J., says: "The court charged the jury that if the defendant was negligent, and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. In determining this question, it is important to first ascertain the relation which existed between the plaintiff and Conlon, the driver. It is very clear, and was found by the jury, that the relation of master and servant did not exist, nor was Conlon in any sense the agent of the plaintiff. . . . It is the case of a gratuitous ride by a female upon the invitation of the owner of the horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its manage-

ment. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every way competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guarantee his perfect care and diligence? There was no necessity for riding with him; it was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself; and I am unable to perceive any reason for imputing Conlon's negligence to her. . . . It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible."

Bennett v. New Jersey R. R. & T. Co., 36 N. J. L. 225, 13 Am. Rep. 435, was the case of a passenger in a horse-car injured by the negligent management of a locomotive by the defendants' engineer, and it was held no defense to show contributory negligence in the driver of the horse-car. In delivering the opinion of the court, Beasley, C. J., said: "The proposition claimed to be law is, that when a passenger enters a public conveyance, he, in some sort, becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debarring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties and that of the servants having the control of the vehicle in which he is riding. This position has for its support the case of *Thorogood v. Bryan*. The authority is, in every respect, in point. . . . The reason given for the judgment is, that the passenger in the omnibus must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could only result in one way, that is, by considering such driver the servant of the passenger. I can see no ground

upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is the right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street-car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a positive fiction. In reality there is no such agency; and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was a passenger, there could be no remedy if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of each driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes."

The recent case of *Little v. Hackett*, *supra*, in the supreme court of the United States, was the case of a person hiring a public hack, and being injured by a collision of the hack and a railway train, caused by the negligence of both the managers of the train and the driver of the hack, over whom the passenger exercised no control, except in directing where he wished to be conveyed. Speaking for the court, Mr. Justice Field said: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence, when no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owners for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan*

rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world. . . . There is no distinction in principle whether the passenger be on a public conveyance, like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route which they wish to travel, or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must, in some way, have co-operated in producing the injury complained of before he incurs any liability for it": *Little v. Hackett*, 116 U. S. 366, 374, 375, 379. These remarks apply with equal force to the case of a person hiring a passage in a private conveyance, or accepting a gratuitous invitation to ride in the carriage of another. The foregoing are actions by passengers injured by the negligence of the driver or manager of the conveyance in which they were riding, coupled with the negligence of the managers of another public conveyance; but there is no distinction in principle between them and the case of a passenger in a private carriage injured by the negligence of the driver and a defect in the highway.

The question whether the negligence of a driver over whom a passenger has no control is a bar to an action by the passenger for injuries caused by an insufficient highway has never been directly raised or determined in this state. It has sometimes been assumed, without being questioned, that the pas-

senger was responsible for the driver's care. The question can only arise in cases where the passenger has no authority or control over the driver, and where the relation of master and servant, or principal and agent, does not exist between the passenger and driver. It does not arise in an action by the owner of a team injured by a defective highway while in the possession and control of a bailee. Property cannot of itself exercise care, or be guilty of negligence. It has no rights or duties independent of the owner, and as towns are liable for damages happening to travelers only, the owner of a team injured by a defective highway, to recover against a town, must show that at the time of the injury it was being used for traveling purposes, and managed with reasonable care, and therefore the owner is bound by the degree of care exercised by the party to whom he has intrusted the care of his property. To recover for a personal injury, a traveler must show that he was personally exercising due care; and to recover for an injury to property, it must appear that the property was used and managed with due care at the time the injury was received. Hence cases for injury to a horse or carriage in the control of a bailee, like *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546, *Cummings v. Centre Harbor*, 57 N. H. 17, and *Stark v. Lancaster*, 57 Id. 88, are not authority for the doctrine that a passenger, personally exercising due care, is necessarily chargeable with the negligence of the driver or manager of the vehicle in which he is riding.

In the absence of any relation of master and servant, or principal and agent, when each is independent of control by the other, why should a passenger be chargeable with the driver's negligence any more than the driver with the passenger's negligence? In traveling in the night, an obstruction in the highway, unknown to the driver, but known to a passenger, causes an injury to both. By informing the driver, the accident would have been avoided, and the passenger was chargeable with negligence in failing to give the information. The passenger cannot recover. Would his negligence preclude the driver, who was in no fault, from recovering? A traveler on foot is responsible only for his own negligence. Why should a traveler in a carriage be held responsible, not only for his own negligence, but also for the negligence of a driver over whom he has no control? It is contended that towns are only required to keep their highways safe for careful driving, and therefore a passenger is necessarily affected by the driver's

negligence. There is no absolute legal test of the sufficiency of a highway. Like the question whether a person is a traveler upon the highway, it is ordinarily a question of fact: *Varney v. Manchester*, 58 N. H. 430; 40 Am. Rep. 592. A highway is not required to be entirely free from defects, but it must be suitable for the travel thereon: Gen. Laws, c. 75, sec. 1. It must be reasonably safe. But it cannot be said, as matter of law, that a highway, sufficient with a safe horse, carriage, and driver, is a reasonably safe highway, nor that a highway to be reasonably safe must be sufficient to prevent accidents with a vicious horse, a defective carriage, or a careless driver.

The fact that an injury to a traveler on a highway was caused by the combined effect of the unsafe condition of the road and the negligence of a third person is no defense to the party who is bound to keep the highway in repair: *Shearman and Redfield on Negligence*; *Winship v. Enfield*, 42 N. H. 197; *Norris v. Litchfield*, 35 Id. 271; 69 Am. Dec. 546; *Cooley on Torts*, 684. A traveler is required to exercise reasonable care in the use of a highway, in the selection of his horse, harness, and carriage; and if he exercises such care, the fact that the vices of the horse or defects in the harness or carriage may have concurred with the unsafe condition of the highway in causing an injury is no defense to the town: *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 45 Id. 317. In harmony with this rule, and upon principle, we think that a traveler should be held to the exercise of reasonable care only in the selection of a driver; and being in no fault in the choice of his conveyance, and having no control over the management of the team, he should not be held responsible for the negligence of the driver which he could not reasonably anticipate or prevent. In *Plummer v. Ossipee*, 59 Id. 55, which was an action by a wife for injuries from an obstruction in a highway while riding with her husband, the defendant claimed that the husband was a fast and careless driver, and introduced in evidence particular instances of his fast and careless driving; and subject to exception, the plaintiff was permitted to testify to other instances of his careful driving when she had been riding with him; and it was held that the evidence was relevant to the husband's character for driving safely or otherwise, and was also relevant to the question of the plaintiff's negligence in selecting a suitable driver on the occasion of the accident.

In this view, the instructions to the jury as to the plaintiff's responsibility for Dearborn's negligence should have been qualified. If the plaintiff was in no fault in riding with Dearborn, and in no way controlled or could control his management of the team, she was not responsible for his negligence.

New trial.

The case of *Thorogood v. Bryan*, 8 Com. B. 115, referred to and combated in the principal case, has at length been overruled in England in the case of *The Bernina*, L. R. 12 P. D. 58. The material portion of the opinion in this latter case may be found in the note to *Borough of Carlisle v. Brisbane*, 57 Am. Rep. 494, in which note the various cases upon the subject are referred to and considered. The opinion of the supreme court of the United States in the case of *Little v. Hackett*, 116 U. S. 366, referred to in the principal case, may also be found in a note to *New York etc. R. R. Co. v. Steinbrenner*, 54 Am. Rep. 135.

IMPUTATION OF NEGLIGENCE OF DRIVER OF VEHICLE TO PASSENGER. — Where one rides upon the public highway in the vehicle of another, merely on the invitation of the latter, and does not exercise or assume any control over the movements of the team, the driver of the vehicle does not become his agent or servant in such sense that his negligence, contributing to an injury occasioned by a defect in the highway, will be imputed to him, so as to defeat his recovery in an action against the municipality: *Nesbit v. Town of Garner*, 75 Iowa, 314; 9 Am. St. Rep. 486, and note 491.

STATE v. CAMPBELL.

[64 NEW HAMPSHIRE, 402.]

POLICE POWER. — LAWS PROHIBITING THE ADULTERATION OF ARTICLES OF FOOD, or preventing imposition or fraud in the sale of such articles, are valid exercises of the police power of the state. Of the necessity for such statutes the legislature is the sole judge.

STATUTES PROHIBITING SALE OF ADULTERATED MILK, or milk to which water or any foreign substance has been added, or the sale as pure milk of any milk from which any cream has been removed, are constitutional and valid.

EVIDENCE — CONSTITUTIONAL LAW. — Statute may authorize an analysis to be made of milk which is claimed to be adulterated, and the result of such analysis to be given in evidence, though the milk analyzed may have been, in the mean time, destroyed.

CONSTITUTIONAL LAW. — LEGISLATURE MAY FIX AN ARBITRARY STANDARD, and declare that all milk falling below that standard is impure or adulterated, and a person cannot escape, when prosecuted under such statute, by proving that the milk, as given by his cows, fell below such standard, though they were fed on proper food.

D. Barnard, attorney-general, and *S. W. Emery*, for the state.

C. H. Burns, for the defendant.

SMITH, J. The offense for which the respondent is indicted is: 1. Selling adulterated milk; 2. Selling milk from which part of the cream had been removed; 3. Selling milk from which all the cream had been removed,—in violation of chapter 42, Laws of 1883, entitled “An act to regulate the sale and inspection of milk.” Section 5 prohibits the sale of adulterated milk, or milk to which water or any foreign substance has been added. Section 6 prohibits the sale of milk from which the cream, or a part thereof, has been removed as pure milk. Section 7 regulates the sale of skimmed milk. Section 8 authorizes inspectors of milk, when they have reason to believe that any milk found by them is adulterated, to take samples thereof, and cause the same to be analyzed. Section 9 provides that in all prosecutions under the statute, if the milk is shown upon analysis to contain more than eighty-seven per cent of watery fluid, or less than thirteen per cent of milk solids, it shall be deemed, for the purposes of the statute, to be adulterated. The jury returned a verdict of guilty, which the respondent moved to set aside because the jury were instructed that section 9 is within the constitutional powers of the legislature, and for the rejection of certain evidence offered by him.

Under what is generally called the police power of the state, the legislature may protect the public health, comfort, and safety by prohibiting the adulteration of articles of food, and may legislate for the prevention of imposition or fraud in the sale of such articles: *Pierce v. State*, 13 N. H. 536; *State v. Clark*, 28 Id. 176; 61 Am. Dec. 611; *State v. Freeman*, 38 N. H. 426; *Gage v. Censors*, 63 Id. 92; 56 Am. Rep. 492. The sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery, and dentistry, the licensing of druggists, and the sales of drugs and medicines, are regulated, and the sale of spirituous or intoxicating liquor prohibited by statute: Gen. Laws, c. 109, 122, 125–129, 132, 133. Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort, and safety of all persons; and for securing this purpose, persons and property are subjected to many restraints and burdens. They are presumed to be rewarded by the common benefits secured.

The statute of 1883 regulating the sale of milk was designed to insure the purity of an article of food of universal consump-

tion, and very largely an article of trade and commerce, many families being dependent upon the dealer for their daily supply. Of the necessity for the statute the legislature is the sole judge. It clearly belongs to the class of police regulations designed to prevent frauds and to protect the health of the people. Similar statutes in other jurisdictions have been held constitutional: *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Waite*, 11 Id. 264; 87 Am. Dec. 711; *Commonwealth v. Luscomb*, 130 Mass. 42; *Commonwealth v. Evans*, 132 Id. 11; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344; *People v. Cipperly*, 101 N. Y. 634; *People v. West*, 106 Id. 293; *Shivers v. Newton*, 45 N. J. L. 469.

The analyst was called by the government, and testified to the same facts as shown by his record or certificate. The calling of the analyst therefore destroyed the force of any constitutional objection to the admission of his record or certificate as evidence, if any such objection could be raised: *Commonwealth v. Waite*, 11 Allen, 264; 87 Am. Dec. 711.

If the respondent's objection is to the admission of evidence as to the facts shown by the analysis, it is untenable. In *State v. Groves*, 15 R. I. 208, it was objected that section 3 of the Rhode Island statute, similar to section 9 of our statute, was unconstitutional, because it virtually confined the testimony to the analysis of the samples taken by the inspector, which were necessarily destroyed in the making of the analysis, so that the testimony could not be controverted. But it was held that the testimony, though it might not always be practicable to controvert it directly by another analysis, could be controverted by evidence of collateral facts going to prove that the analysis was incorrect, and therefore that the statute was not unconstitutional for the reason alleged. The same objection, if well founded, might exclude evidence of analyses made in *post-mortem* examinations: See also *Shivers v. Newton*, 45 N. J. L. 469; *People v. Cipperly*, 101 N. Y. 634; *Commonwealth v. Waite*, 11 Allen, 264; 87 Am. Dec. 711.

The fixing of an arbitrary standard in section 9 for pure or unadulterated milk does not render the statute unconstitutional. In *People v. Cipperly*, 37 Hun, 324, a similar statute of New York was pronounced unconstitutional, upon the ground that it deprived the defendant of his liberty and property without due process of law, in that it deprived him of the right upon trial to have the issue determined according to the evidence of the fact, and compelled him to submit

to the statutory declaration of the fact without having the truth ascertained. This decision was reversed in the court of appeals (*People v. Cipperly*, 101 N. Y. 634), and the constitutionality of the statute sustained on grounds stated in the dissenting opinion in the court below, where the object of the statute was declared to be to regulate and control the quality of an article of food in the interest of the health of the people. Learned, P. J., said: "But the defendant takes the broader ground, that the legislature cannot, under the constitution, prohibit the sale of milk drawn from healthy cows which, in its natural state, falls below the standard fixed by the acts, unless such milk, or the article made from it, is in fact unwholesome or dangerous to public health. How is that question of fact to be determined? The court cannot take judicial notice whether milk below the standard is or is not unwholesome or dangerous to public health. Is that to be a question for the jury? If so, the court must charge a jury in each case that if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or rather unsettled, in that way. The constitutionality would vary with the varying judgments of juries. Either, then, the legislature can, under the constitution, forbid the sale of milk below a certain standard, whether such milk be in fact wholesome or not, or else they cannot do this whether such milk be in fact wholesome or not. If they may fix a standard, they must judge whether or not milk below that standard is wholesome. The courts cannot review that judgment."

The statute tends to discourage the breeding of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the legislature in fixing a standard of richness. Practically it makes no difference whether milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution, regarded by the legislature as excessive, arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of its value is a fraud which the statute was designed to suppress. It is a valid exercise by the legislature of the police power for the prevention

of fraud and the protection of the public health, and as such is constitutional.

These remarks dispose of the respondent's offer to show that an analysis of samples of milk from his cows, made by the same person who analyzed the samples taken by the milk inspector, show less than thirteen per cent of milk solids.

The offer to show that the respondent's cows were properly fed, not having been made for the purpose of discrediting the analysis put in by the state, was properly rejected. The evidence was immaterial.

Exceptions overruled.

The same court reiterated the principles of the principal case in *State v. Marshall*, 64 N. H. 549. That was a prosecution founded on chapter 68 of the statutes of New Hampshire for the year 1885, which reads as follows: "Whoever by himself or his agent shall sell, expose for sale, or have in his possession with intent to sell, any article or compound made in imitation of butter, or as a substitute for butter, and not wholly made from milk or cream, and that is of any other color than pink, shall for every package that he or they sells or exposes for sale forfeit and pay a fine of fifty dollars." The defendant assailed the statute as unconstitutional, on the ground that the legislature had no power to compel him to so color an innocent and wholesome article of food as to subject it to ridicule and degrade it in the eyes of the public. The court, in sustaining the statute, said:—

"By article 5 of part 2 of the constitution of the state, the legislature is authorized 'to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof and of the subjects of the same.' Under this grant, the power of the legislature to regulate the sale of articles of food, and to legislate for the prevention of adulteration, deception, and fraud in the sale of provisions, is unquestioned. The enactment of laws for the protection of the public from fraud and deception in articles of food in common and general use is a legitimate exercise of the police power of the state by the legislature. The statutes requiring the inspection of flour, beef, pork, butter, lard, and fish (Gen. Laws, c. 125-129) are of this class, and the statutes regulating the sale of milk (Laws of 1883, c. 42), the sale and offering for sale of bread, pressed hay, cord-wood, commercial fertilizers, and illuminating oils (Gen. Laws, c. 122), and the prevention of adulterations (Gen. Laws, c. 271), are founded upon the same principle,—the protection of the public from imposition and fraud. Such legislation is clearly within the scope of legislative authority conferred by the constitution. 'A fraud is, of course, a trespass upon another's private rights, and can always be punished when committed. It is, therefore, but rational to suppose that the state may institute every reasonable preventive remedy, when the frequency of the frauds, or the difficulty experienced in circumventing them, is so great that no other means will prove efficacious. Where, therefore, police regulations are established which give to private parties increased facilities for detecting and preventing fraud, as a general proposition, these laws are free from all constitutional objections': Tiedeman on Limitation of Police Power, 207.

"The statute under consideration is entitled 'An act relating to the sale of imitation butter,' and it prohibits the sale of imitation butter as genuine. The purpose and intent of the statute being the protection of the public against imposition, it is within the constitutional power of the legislature to enact it. The demurrer admits that oleomargarine is within the prohibition of the statute, although not specially named in it, and that it is an article or compound made, not wholly from milk or cream, in imitation of butter, and as a substitute for butter. The design of the act is to protect purchasers and consumers against deception, and this is accomplished by requiring the article sold or offered for sale as a substitute for butter to be of a pink color, to show that it is not genuine butter. The sale of oleomargarine is not prohibited. The prohibition is against the sale or exposing for sale of any article or compound made in imitation of butter, or as a substitute for it, and not made wholly from milk or cream, of any other color than pink, to designate its true character. Butter is a necessary article of food, of almost universal consumption; and if an article compounded from cheaper ingredients, which many people would not purchase or use if they knew what it was, can be made so closely to resemble butter that ordinary persons cannot distinguish it from genuine butter, the liability to deception is such that the protection of the public requires those dealing in the article in some way to designate its real character. It being within the constitutional power of the legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the legislature to determine what regulations are needed for that purpose: Cooley on Constitutional Limitations, 3d ed., 168. And it cannot be held as matter of law that it is not within the constitutional limits of legislative discretion to require imitation butter, when sold or exposed for sale, to be colored a pink color, to designate its real character, and thereby prevent deception and fraud.

"The prohibition of the statute being directed against imposition in selling or exposing for sale artificial compounds resembling butter in appearance and flavor, and liable to be mistaken for genuine butter, it is no defense that the article sold or exposed for sale is free from impurity and unwholesome ingredients, and healthy and nutritious as an article of food. The legislature, in the exercise of the police power, for the purpose of preventing fraud, may prohibit the sale of pure milk mixed with pure water, or below a certain standard, and such regulation is no invasion of constitutional rights: *State v. Campbell*, 64 N. H. 402; *ante*, p. 424; *Commonwealth v. Evans*, 132 Mass. 11; *State v. Smyth*, 14 R. I. 100; 51 Am. Rep. 344; *People v. Cipperly*, 101 N. Y. 634; *People v. West*, 106 N. Y. 293; 60 Am. Rep. 452. Similar statutes have been held constitutional in other jurisdictions: *State v. Addington*, 77 Mo. 110; *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638; *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350; *People v. Arensberg*, 105 N. Y. 123; 57 Am. Rep. 741."

POWER OF THE STATE TO REGULATE OR PROHIBIT THE MANUFACTURE OR SALE OF ARTICLES. — A statute intended to restrain or suppress the manufacture and sale of oleomargarine, and such like compounds, intended and sold as a substitute for butter, is valid as a legitimate exercise of the police power of the state: See *Butler v. Chambers*, 36 Minn. 69; 1 Am. St. Rep. 638, and monographic note 644-650, for an exhaustive discussion on this subject. The legislature may forbid the sale of counterfeits, and the law passed in New Jersey against counterfeit butter, or oleomargarine, is valid and constitutional: *State v. Newton*, 50 N. J. L. 534.

FOWLER v. BROOKS.

[64 NEW HAMPSHIRE, 423.]

DISQUALIFIED JUDGE. — By the common law of this state, a judge related to either party within the fourth degree is not qualified to sit in the case.

JUDGMENT PRONOUNCED BY A DISQUALIFIED OR INTERESTED JUDGE is voidable only, and not void.

REPLEVIN. The defendant justified under an execution issued upon a judgment against the plaintiff, and a sale under such judgment to the defendant of the property in controversy. The plaintiff claimed that such judgment, and all proceedings under it, were void, on the ground that the judgment was rendered by a justice of the peace whose father was a cousin of the father of the wife in the original action.

J. H. Hobbs, for the plaintiff.

J. B. Nash, for the defendant.

CARPENTER, J. Durgin's wife and the justice were second cousins. By the common law of this state, a judge related to either party within the fourth degree is not qualified to sit in the cause: *Bean v. Quimby*, 5 N. H. 94; *Gear v. Smith*, 9 Id. 63; *Sanborn v. Fellows*, 22 Id. 473; *Moses v. Julian*, 45 Id. 52; 84 Am. Dec. 114. The question whether he is disqualified by a more distant relationship (*Sanborn v. Fellows*, 22 N. H. 488) need not now be determined; because, assuming that the justice could not lawfully act in the case, the judgment was voidable only, and not void: *Moses v. Julian*, *supra*; *Stearns v. Wright*, 51 N. H. 600; *Crowell v. Londonderry*, 63 Id. 49; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759, 785, 790; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 22. In the last-named case the court say (page 22): "As a rule, the judgment of an interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void, and persons acting under the authority of such a judgment, before it is set aside by competent authority, would not be liable to be treated as trespassers." The plaintiff had a complete remedy by appeal. A judgment rendered in this state against a citizen of this state (*Rangely v. Webster*, 11 N. H. 299; *Russell v. Perry*, 14 Id. 152; *Eastman v. Dearborn*, 63 Id. 364; *Carleton v. Bickford*, 13 Gray, 591; 74 Am. Dec. 652; *Finneran v. Leonard*, 7 Allen, 54; 83 Am. Dec. 665; *McCormick v. Fiske*, 138 Mass. 379; *Eliot v. McCormick*, 144 Mass. 10; *Coit v. Haven*, 30 Conn. 190; 79 Am. Dec. 244), by

a court, or by any tribunal, for the revision of whose proceedings a direct process by appeal or otherwise is provided, cannot be collaterally impeached by a party, except for want of jurisdiction of the subject-matter: *Smith v. Knowlton*, 11 N. H. 191; *Morse v. Presby*, 25 Id. 299, 303; *Gurnsey v. Edwards*, 26 Id. 224, 229; *State v. Richmond*, 26 Id. 232; *Nichols v. Smith*, 26 Id. 298, 300; *State v. Canterbury*, 28 Id. 195, 224; *Claggett v. Simes*, 31 Id. 56; *Haywood v. Charlestown*, 34 Id. 23; *State v. Rye*, 35 Id. 368; *Gay v. Smith*, 38 Id. 171; *Kimball v. Fisk*, 39 Id. 110; *State v. Towle*, 42 Id. 540; *State v. Shattuck*, 45 Id. 205, 211; *Boody v. Watson*, 64 Id. 162, 184; *Hendrick v. Whittemore*, 105 Mass. 23; and the cases before cited. It is not now necessary to consider whether, consistently with this result, the decision in *Davis v. Hazen*, 61 N. H. 383, can be upheld.

Judgment for the defendant.

DISQUALIFICATION OF A JUDGE. — A judge is disqualified from sitting in the trial of a case by relationship or affinity to either party in interest in the suit: *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114, and note 126-132, for a complete discussion as to the validity of judgments by disqualified judges.

BEEDE v. LAMPREY.

[64 NEW HAMPSHIRE, 510.]

MEASURE OF DAMAGES IN ACTION OF TROVER TO RECOVER FOR TREES

CARELESSLY, but not willfully, cut on plaintiff's land is the value of such trees at the place where and immediately after they were severed. Nothing can be added for increased value given to them by subsequent acts of the defendant, such as trimming them and hauling them to his mill.

TROVER for spruce logs which the defendant had negligently, but without malice, cut on the lands of the plaintiff, and had subsequently trimmed and taken to a saw-mill. The parties were coterminus proprietors, and the trees cut were near the line dividing their lands. The plaintiff insisted that he had a right to recover the value of the trees at the mill to which they had been taken, while the defendant's position was, that a proper measure of damages was the value of the stumpage.

E. A. and C. B. Hibbard, for the plaintiff.

Jewell and Stone, for the defendant.

ALLEN, J. The claim of the plaintiff to recover as damages the value of the logs at the mill, which includes the value added by cutting and transporting them, is founded upon his title and right of possession of the property there, and his right to treat it as converted at any time between its severance from the realty and the commencement of the action. The plaintiff had the title to the logs and the right of possessing them at the mill. Whenever and wherever they may have been converted, the conversion did not change the title, so long as the property retained its identity. The title could be changed only by a suit for damages, with judgment, and satisfaction of that judgment: *Smith v. Smith*, 50 N. H. 212, 219; *Dearth v. Spencer*, 52 Id. 213.

The plaintiff might have recovered the logs themselves at the mill, or wherever he could have found them, and so availed himself of their value there by replevin, or by any form of action in which the property *in specie*, and not pecuniary damages, are sought. But in such a case, if the claimant makes a title, no question of damages or compensation for loss arises. He recovers his own in the form and at the time and place in which he finds it. In trespass *quare clausum*, with an averment of taking and carrying away trees, the plaintiff may recover for the whole injury to the land, including the damage for prematurely cutting the trees and for the loss of the trees themselves, but nothing for the value added by the labor of cutting and transporting them: *Wallace v. Goodall*, 18 N. H. 456; *Foote v. Merrill*, 54 Id. 490; 20 Am. Rep. 151. Trover cannot be maintained for any injury to the realty, but only for the conversion of chattels; and in this case the plaintiff is limited in his recovery to the loss of the trees; that is, his loss by the defendant's converting them by their severance from the land.

The usual rule of damages in actions of trover is compensation to the owner for the loss of his property occasioned by its conversion; and where the conversion is complete, and results in an entire appropriation of the property by the wrong-doer, the loss is generally measured by the value of the property converted, with interest to the time of trial: *Hovey v. Grant*, 52 N. H. 569; *Gove v. Watson*, 61 Id. 136.

The defendant converted the logs by cutting and severing the trees from the land, and the conversion being complete by that wrongful act, their value there represents the plaintiff's loss. His loss is no greater by reason of the value added

by the labor of cutting and transportation to the mill. It does not appear that the logs were of special or exceptional value to the plaintiff upon the land from which they were taken, nor that he had a special use for them other than obtaining their value by a sale, nor that the market price had risen after their conversion. If, in estimating the damages, the value at the mill increased by the cost of cutting and transportation is to be taken as the criterion, the plaintiff will receive more than compensation for his loss. With such a rule of damages, if, besides the defendant, another trespasser had cut logs of an equal amount upon the same lot, and had hauled them to the lake shore, and a third had simply cut and severed the trees from the land and sold them there, and suits for their conversion had been brought against each one, the sums recovered would differ by the cost of transporting the logs to the place of the alleged conversion, while the loss to the plaintiff would be the same in each of the three cases. The injustice of such an application of the rule of damages is apparent from the unequal results.

In *Foot v. Merrill*, *supra*, which was trespass *quare clausum*, and for cutting and removing trees, it was decided that the plaintiff could recover for the whole injury to the land, including the value of the trees there, but not any increase in value made by the cost of cutting and taking them away. In the opinion it is said,—Hibbard, J.: “If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit.” This *dictum* not being any part of nor necessary to the decision of that case, and given in language expressive of doubt, cannot be invoked as a precedent decisive of this case. When trespass *de bonis asportatis* is coupled with trespass *quare clausum*, either as a separate count or as an averment in aggravation of damages, as in *Foot v. Merrill*, *supra*, the increase in damages by reason of such averment and proof of it is the value of the chattels taken and converted, and in such a case is the same as the whole damages would have been in an action of trespass *de bonis*: *Smith v. Smith*, 50 N. H. 212, 219. Had the plaintiff in *Foot v. Merrill*, *supra*, sued in trespass for taking and carrying away the trees merely, he would have recovered their value,

upon the lot at the time of the taking, allowing nothing for the expense of cutting and removing them. And no good reason appears why the same rule of damages should not prevail in trover as in trespass *de bonis asportatis*. The loss to the plaintiff from the taking and carrying away of his property is ordinarily the same as the conversion of it by complete appropriation, and the rule of compensation for the loss gives him the value of his property at the time and place of taking or conversion, and interest from that time for its detention.

The English cases upon the subject give as the rule of damages, when the conversion and appropriation of the property are by an innocent mistake and *bona fide*, or where there is a real dispute as to the title, the value of the property in place upon the land, allowing nothing for enhancement of value by labor in its removal and improvement. But when the conversion is by fraud or willful trespass, the full value at time of demand and refusal is given: *Martin v. Porter*, 5 Mees. & W. 351; *Morgan v. Powell*, 3 Ad. & E., N. S., 278; *Wood v. Morewood*, 3 Id. 440, note; *Wild v. Holt*, 9 Mees. & W. 672; *In re United Collieries Co.*, L. R. 15 Eq. 45.

The early New York cases give the full value at the time of conversion, including any value added by labor and change in manufacturing: *Betts v. Lee*, 5 Johns. 348; 4 Am. Dec. 368; *Curtis v. Groat*, 6 Johns. 168; 5 Am. Dec. 204; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66. In these cases the conversion is treated as tortious, and the same as if made by willful trespass. In later cases a distinction is made between a willful taking and conversion; and the rule of just compensation is upheld in case of the conversion of trees at least, and their value upon the land is given as damages when the conversion does not result from willful trespass: *Whitbeck v. N. Y. Central R. R. Co.*, 36 Barb. 644; *Spicer v. Waters*, 65 Id. 247. The Illinois decisions make no distinction between cases of willful trespass and those of conversion by mistake or inadvertence, and include in damages all enhancement in value from any cause before suit is brought: *Robertson v. Jones*, 71 Ill. 405; *McLean County Coal Co. v. Long*, 81 Id. 359; *Illinois etc. R. R. etc. Co. v. Ogle*, 82 Id. 627; 25 Am. Rep. 342.

In Maine the increased value added by cutting and removing the timber is not included in the damages, although the conversion be by willful trespass: *Cushing v. Longfellow*, 26

Me. 306; *Moody v. Whitney*, 38 Id. 174; 61 Am. Dec. 239. And the same rule seems to govern in Massachusetts (*Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 86), and did in Wisconsin (*Weymouth v. Chicago and Northwestern R'y Co.*, 17 Wis. 567; 84 Am. Dec. 763; and *Single v. Schneider*, 30 Wis. 570) until the legislature of that state in 1873 enacted a statute providing that the rule of damages, in the case of one wrongfully cutting and converting timber on the land of another should be the highest market value of the property up to the time of trial, in whatever state it might be put: *Webster v. Moe*, 35 Id. 75; *Ingram v. Rankin*, 47 Id. 406; 32 Am. Rep. 762.

The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss, that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrong-doer's mistake, or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner, or a contemplated special use of the property by him: *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *Herdie v. Young*, 55 Pa. St. 176; 93 Am. Dec. 739; *Woolley v. Carter*, 7 N. J. L. 85; 11 Am. Dec. 520; *Franklin Coal Co. v. McMillan*, 49 Md. 549; 33 Am. Rep. 280; *Barton Coal Co. v. Cox*, 39 Md. 1; 17 Am. Rep. 525; *Bennett v. Thompson*, 13 Ired. 146; *Railway Co. v. Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629; *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Winchester v. Craig*, 33 Mich. 205; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Ellis v. Wire*, 33 Ind. 127; 5 Am. Rep. 189; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Waters v. Stevenson*, 13 Id. 177; 29 Am. Rep. 293; *Goller v. Fett*, 30 Cal. 481; *Gray v. Parker*, 38 Mo. 160, 166; *Wooden-ware Co. v. United States*, 106 U. S. 432, 434; Sedgwick on Damages, 5th ed., 571, 572; Cooley on Torts, 457, 458, note. In cases of conversion by willful act or by fraud, the value added by the wrong-doer after conversion is sometimes given as exemplary or vindictive damages, or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages.

The contention of the plaintiff, that he is entitled to recover the value of the logs increased by the expense of cutting and removal to the mill in Wolfeborough, because, as the case

finds, the defendant's acts constituting the conversion were negligent, cannot be sustained on any ground warranting vindictive damages. The cutting and taking the logs was not a willful trespass, nor does it appear that the defendant's want of reasonable care amounted to a fraud. No malice is shown, nor were there other facts of outrage upon which such damages could be predicated. No part of the damages in dispute is found as exemplary, and the plaintiff cannot be permitted to assign as damages to his feelings a mere value added to the property by the defendant after the completion of the tort, nor take as a benefit that which is outside of compensation for the wrong: *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270; *Bixby v. Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Kimball v. Holmes*, 60 N. H. 163.

The damages must be according to the usual rule in trover, which is the value of the property at the time of conversion and interest after. The severance of the trees from the land, and their conversion from real to personal property, was in law a conversion of the property to the defendant's use. The value of the trees immediately upon their becoming chattels, that is, as soon as felled, which is found to be \$1.50 per thousand feet, with interest from that time, the plaintiff is entitled to recover.

Judgment for the plaintiff.

TROVER. — DAMAGES FOR CONVERSION OF PROPERTY, in good faith, and under a mistake of one's rights, are not to be measured by the highest market value up to the day of trial: *Wright v. Bank of Metropolis*, 110 N. Y. 237; 6 Am. St. Rep. 356, and note 365. In trespass and trover for logs cut and carried away in the mistaken belief that defendant's employer was the owner, the damage is the value in the woods whence they were taken, and not at the mill to which they were carried to be sawed: *Tilden v. Johnson*, 52 52 Vt. 628; 36 Am. Rep. 769. Where timber was cut by trespassers, and converted into cross-ties, thereby increasing its value threefold, the measure of damages must not be the enhanced value of the timber after it was severed from the realty: *Railway Co. v. Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629. The measure of damages for logs willfully cut and taken away by trespassers is their value at the time and place of conversion, with interest: *Skinner v. Pinney*, 19 Fla. 42; 45 Am. Rep. 1. Compare *Barton Coal Co. v. Cox*, 39 Md. 1; 17 Am. Rep. 525; *Foote v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151; *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *Backettoss v. Stahler*, 33 Pa. St. 251; 75 Am. Dec. 592; *McCue v. Smith*, 19 Minn. 252; 85 Am. Dec. 273. But in the states of Wisconsin and Pennsylvania, where for the wrongful cutting of timber the owner may recover statutory damages, no interest can be recovered on such amount: *Smith v. Morgan*, 73 Wis. 375; *Dunbar Furnace Co. v. Fairchild*, 121 Pa. St. 563.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

HUYCK *v.* ANDREWS.

[118 NEW YORK, 51.]

COVENANT AGAINST ENCUMBRANCES IS BROKEN BY AN OUTSTANDING EASEMENT of any kind other than that of a public highway.

AN EASEMENT IS AN INTEREST IN LAND CREATED by grant or agreement, expressed or implied, conferring a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or from the estate of another.

AN ENCUMBRANCE, WITHIN THE TERMS OF A COVENANT AGAINST ENCUMBRANCES, INCLUDES every right to or interest in the land to the diminution of the value of the land, but consistent with the passage of the fee for the land.

BREACH OF A COVENANT AGAINST ENCUMBRANCES TAKES PLACE THE INSTANT the conveyance is made.

COVENANTS IN A DEED PROTECT THE GRANTEE AGAINST EVERY ADVERSE RIGHT, interest, or dominion over the land, whether he had notice of such adverse interest or not.

VISIBLE AND NOTORIOUS EASEMENTS ARE NOT EXCEPTED FROM THE OPERATION of a covenant against encumbrances.

EVIDENCE. — In an action to recover for a breach of a covenant against encumbrances based upon the existence of an easement consisting of a right to maintain a dam, the defendant is not entitled to ask the owner of such dam what is the fair value of his dam in connection with his mill.

ACTION for breach of a covenant against encumbrances. Judgment given for the plaintiff by the trial court was affirmed by the general term.

Nathaniel C. Moak, for the appellant.

Eugene Burlingame, for the respondent.

EARL, J. In March, 1880, the defendant conveyed to Maria W. Huyck, plaintiff's intestate, by what is commonly known as a full covenant deed, certain land situate in the town of Coeymans, in the county of Albany, which, as described in the deed, contained the whole of Hawneycroix Creek within its boundaries. Prior thereto, Amos Briggs had received a deed of adjoining land on the east side of the creek, which conveyed to him, with the land, an easement, as follows: "The right to the use of the whole of the water of the said Hawneycroix kill or creek; also the right to erect and maintain a dam across said creek, and to connect same to the opposite bank thereof, at such place as the dam now is, and to extend the same, by an embankment or otherwise, from the bank at the water's edge to the high bank or hill west thereof; and the right, also, from time to time, to go onto and upon the land on the opposite side of said creek, for the purpose of erecting and maintaining said dam or dams, and of using thereof the land for that purpose."

Upon the land thus conveyed to Briggs there was a paper-mill, and there had been erected a dam across the creek to the westerly side thereof; and he and those under whom he held had used the waters of the creek for the purposes of that mill for many years. Subsequently to the conveyance to Mrs. Huyck, Briggs entered upon the land, and built an embankment westerly from the edge of the creek to the high bank upon her land. Afterward she brought this action for the breach of the covenants contained in her deed by the existence and use of the easement which Briggs had in the land conveyed to her. She recovered, and the defendant has appealed to reverse her judgment. He claims that the easement owned by Briggs was open, visible, and well known to Mrs. Huyck at the time she took her deed, and that therefore the covenants in the deed do not protect her against it. It is true that she knew that the paper-mill and dam across the creek were there, and that the waters of the creek had been used for many years for the purposes of the mill. But it does not appear that she knew the full extent of Briggs's easement, or that she had any knowledge whatever that he had any paramount right to the exclusive use of the waters of the creek, or to maintain his dam where it was located as high as he wished. But even if she had such knowledge, that fact furnished no defense to this action.

The deed entitled her to a perfect title to all the land which

it purported to convey, free from any encumbrance thereon, and it is no defense to her action that at the time she took it she knew of some encumbrance or some defect in the title. Proof of such knowledge would be quite important in an action brought by her grantor to reform the deed, but as a defense to an action upon the covenants contained in the deed, it is of no importance whatever. That the covenant against encumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this state, and there is no hint in any of them that knowledge by the grantee of the existence of the easement at the time of the conveyance makes any difference. An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. An encumbrance, within the terms of the covenant against encumbrances, is said to be "every right to or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance": *Prescott v. Trueman*, 4 Mass. 627; 3 Am. Dec. 246; and the breach of such a covenant takes place at the instant the conveyance is made.

There is in this state one exception to the rule that the existence of an easement constitutes a breach of the covenant against encumbrances, and that is in the case of a highway. It was held in *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272, that it is not a breach of the covenants that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in this state. It was based upon the peculiar nature of highway easements, and the general understanding with reference to them. Spencer, J., writing the opinion, said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary

to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements, and the rule of that case has not been applied to any other. While there was not in the deed there under consideration any covenant against encumbrances, yet the *ratio decidendi* is equally applicable to such a covenant; and since that decision it has always been understood in this state that such a covenant is not broken by the existence of a highway.

In *McMullin v. Wooley*, 2 Lans. 394, it was held that the right to take water by means of a pipe laid beneath the ground from a spring on the premises conveyed constituted a breach of the covenant against encumbrances. In *Roberts v. Levy*, 3 Abb. Pr., N. S., 311, it was held that a covenant, entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected upon the lots should be set back a specified distance from the street on which the lots fronted, constituted an encumbrance upon the lots to which it applied; and if subsequently conveyed by deed containing the usual covenant against encumbrances, a breach of the latter covenant arises the instant the deed is executed. In *Rea v. Minkler*, 5 Lans. 196, it was held that the existence and use of a private right of way over the granted premises was a breach of warranty; and *Blake v. Everett*, 1 Allen, 248, *Russ v. Steel*, 40 Vt. 310, and *Wetherbee v. Bennett*, 2 Allen, 428, are to the same effect.

In *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, where the owner of land upon a stream conveyed the same with a covenant of quiet enjoyment, and subsequently an owner below, under and by virtue of a paramount right, raised the height of a dam upon his land and thereby flooded the land conveyed, it was held that there was substantially an eviction and a breach of the covenant. In *Mitchell v. Warner*, 5 Conn. 497, it was held that a pre-existing right in a third person to take water from the land conveyed is a breach of a covenant against encumbrances. In *Morgan v. Smith*, 11 Ill. 194, it was held that an easement authorizing one to dam up and use the water of a branch running over the land conveyed, and to use the water of a spring upon it, is a breach of the covenant against encumbrances. In *Medler v. Hiatt*, 8 Ind. 171, there was a

conveyance of land, with covenants against encumbrances, through which there was a stream of water, and at the time of the conveyance there was across the creek, a short distance below the land conveyed, a dam which backed the stream up so as to overflow a large quantity thereof. The action was brought upon promissory notes given for the purchase price of the land. The defense set up was breach of covenant against encumbrances. To this defense the plaintiff replied, *inter alia*, that the defendant, when he purchased the land, knew of the existence of the dam and of the right to flow back the water; and to this reply the defendant demurred. The demurrer was overruled, and upon appeal the judgment upon the demurrer was reversed. The court said: "It is conceded that the action of the court in overruling the demurrer raises the main question in the case, and in support of that ruling it is insisted that, as the appellant received a deed for the lands with full notice of the dam, and the right to continue it, the law presumes that he took the conveyance subject to the encumbrance. The rule of decision on this subject, as evinced by various authorities, is to some extent unsettled. None of the authorities, however, sustain the position that mere notice to the vendee, at the time he receives his deed, of an existing encumbrance excludes it from the operation of an express covenant against encumbrances. . . . The plaintiff's reply contains nothing from which a contract relative to the easement can be inferred. It is true, the defendant knew of the encumbrance, but mere notice of it does not indicate even an intent to relinquish any remedy he might have under the covenants in his deed." In *Hovey v. Newton*, 7 Pick. 29, the action was covenant upon a lease of water-works and buildings, with the whole control of the water in the pond, except the right which one Bangs had to take water in logs to his garden, and a similar right reserved to the lessor; and the court held that parol evidence was not admissible to prove that, in the intention of the parties to the lease, there was likewise an exception of the right which the county of Worcester had exercised for more than twenty years, of occasionally diverting part of the water for the purpose of cleansing the county jail, and which diversion was well known to the parties at the time of making the lease. In *Mohr v. Parmelee*, 11 Jones & S. 320, a party-wall was wholly on one of two contiguous lots of land, yet subject to appropriation and use for all the purposes of a party-wall by the proprietor of the other by

reason of a prior grant, and it was held that it constituted an encumbrance upon the land on which it stood; that when a title is encumbered by such an easement a right of action immediately accrues; and that whether the covenantee had or had not knowledge or notice of its existence is immaterial, both as regards his right of action and the question of damages. In 2 Greenleaf on Evidence, section 242, it is said: "A public highway over the land, a claim of dower, a private right of way, a lien by judgment or by mortgage, or any other outstanding, elder, and better title is an encumbrance, the existence of which is a breach of this covenant. In these and the like cases it is the existence of the encumbrance which constitutes the right of action, irrespective of any knowledge on the part of the grantee or of any eviction of him." In 2 Dart on Vendors and Purchasers, 6th ed., 886, the following language is used: "Although the fact of the purchaser having notice of the defect cannot prevent the covenants for title from extending to it, since extrinsic evidence is inadmissible for the purpose of construing a deed, yet in an action to rectify the covenant, that fact can be used as the basis of an inference that it could not have been the intention of the parties that the covenant should include a defect of which both parties were aware." To the same effect are the following authorities: *Beach v. Miller*, 51 Ill. 207; 2 Am. Rep. 290; *Barlow v. McKinley*, 24 Iowa, 70; *Gerald v. Elley*, 45 Id. 322; *Butt v. Riffe*, 78 Ky. 352; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426.

In *Mott v. Palmer*, 1 N. Y. 564, the action was to recover damages for breach of the covenant of seisin because the grantor did not at the time of the conveyance own certain fence-rails constituting part of a fence, and Bronson, J., writing one of the opinions, said: "That parol evidence was inadmissible to control the legal effect and operation of the deed is too plain a proposition to be disputed. If the plaintiff had been told at the time that Brown owned the rails, and more, if the rails had been expressly excepted by parol from the operation of the grant and covenant, it would have been no answer to the action. A deed cannot be contradicted in its legal effect any more than it can in its terms."

To support the contention of the appellant, his counsel has placed much reliance upon the cases of *Kutz v. McCune*, 22 Wis. 628, and *Memmert v. McKeen*, 112 Pa. St. 315. In *Kutz v. McCune*, *supra*, it was held that an easement obviously and

notoriously affecting the physical condition of the land at the time of its sale is not embraced in the general covenant against encumbrances. In *Memmert v. McKeen*, *supra*, it was held that encumbrances are of two kinds: 1. Such as affect the title; and 2. Such as affect only the physical condition of the property; that where encumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects, not the title, but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition, and with reference thereto. We do not yield assent to these authorities. They have no sanction in any of the cases decided in this state, and have no adequate foundation in principle or reason. They open to litigation, upon parol evidence, in every action for the breach of the covenant against encumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title or encumbrances upon the land; but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and encumbrances, to except them from the operation of his covenants. The distinction which is attempted to be made between encumbrances which affect the title and those which affect merely the physical condition of the land conveyed is quite illusory and unsatisfactory. Easements not only affect the physical condition of the land, but they affect and impair the title. The owners of them have an interest in and dominion over the servient tenement which

frequently may largely impair its usefulness and value. The rule contended for would operate very unjustly, and would be quite difficult to administer in many cases. In this case, while the grantee knew of the existence of the dam, and of some use of the water, she did not know of the right to extend the dam from the edge of the water to her high land on the west side of the creek; nor did she know of the right Briggs had to use the entire water of the stream.

We are therefore of opinion that Mrs. Huyck was entitled to the protection of the covenant against encumbrances.

The defendant alleged in his answer that there was a mutual mistake, in that his conveyance was not made subject to the easement owned by Briggs; and by way of counterclaim, he prayed relief that the deed be reformed. The issue thus tendered was tried, and found against him. Upon the trial he called Briggs as a witness, and he was asked this question: "What is the fair value of your dam in connection with your mill?" This was objected to by the plaintiff, as no measure of damages in the suit, and the objection was overruled. The witness answered: "It is worth ten thousand dollars,—the dam and water privilege." Then plaintiff's counsel moved to strike out the answer "as incompetent, and not a proper basis of damages," and the motion was denied. Defendant's counsel then stated that his "object in offering the evidence was to show that if this dam and stream were worth ten thousand dollars, the defendant was a fool, and plaintiff was a knave in paying four thousand dollars for this water privilege, together with fifteen acres of land." The judge then granted the motion, and the testimony was stricken out, and defendant's counsel excepted. It is now claimed that this evidence was improperly stricken out. Both parties were permitted to give evidence as to the value of the easement in connection with the land conveyed, and the rule for estimating plaintiff's damages, adopted by both parties, was the difference between the value of the land without the easement and its value with the easement as an encumbrance thereon, and there was but little variation in the estimates of the witnesses. It was shown by competent evidence that if the deed to Mrs. Huyck had conveyed a perfect title to all the land described, without the easement, it would have been worth four thousand dollars, and with the easement, eight hundred dollars less. That evidence was pertinent, both on the question of plaintiff's damages and upon the issue for

the reformation of the deed. The consideration mentioned in the deed is four thousand dollars, and hence it appeared that the plaintiff paid for the premises what they were worth, free from the encumbrance of the easement, and that circumstance was entitled to some weight upon the issue for the reformation of the deed. But what the dam and the water might be worth in connection with an expensive mill on the other side of the creek could have no bearing upon that issue. They might be worth ten thousand dollars to Mr. Briggs, depending upon the value of his mill and the business connected therewith,—that is, rather than have his mill and business destroyed, he might be willing to pay that sum, but what he might be willing to pay under such circumstances would be no criterion of the real value of the easement. So far as that value has any bearing upon that issue, the evidence stricken out would have been delusive, and might have been misleading. It was certainly too remote.

We are therefore of opinion that the judgment should be affirmed, with costs.

Judgment affirmed.

COVENANTS AGAINST ENCUMBRANCE — WHAT IS A BREACH OF. — Where a tract of land was conveyed with covenants of title and against encumbrance, and at the time, such tract was subject to the easement of a right of way for a railway, and also a highway, there was a breach of the covenant against encumbrances: *Beach v. Miller*, 51 Ill. 52; 2 Am. Rep. 290; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426; *Burk v. Hill*, 48 Ind. 52; 17 Am. Rep. 731; but a covenant against encumbrances in a deed of land is not broken by the existence of a public road over the land known to the purchaser at the time of the purchase: *Desvergers v. Willis*, 56 Ga. 515; 21 Am. Rep. 289. The existence of an easement obviously and notoriously affecting the physical condition of the land at the time of its sale, such as a right of flowing the land by a mill-pond in actual use upon it, does not constitute a breach of a general covenant against encumbrances: *Kutz v. McCune*, 22 Wis. 628; 99 Am. Dec. 85.

COVENANT AGAINST ENCUMBRANCES IS BROKEN AT THE TIME OF THE CONVEYANCE by the existence of an outstanding mortgage on the premises: *Reed v. Pierce*, 36 Me. 455; 58 Am. Dec. 761; *Andrews v. Davison*, 17 N. H. 413; 43 Am. Dec. 606. Where the grantor has neither title nor possession, the covenant of seisin is broken as soon as the deed is executed; *Jackson v. Green*, 112 Ind. 341. A covenant of warranty can never be treated as a covenant against encumbrances, for it would be broken as soon as made, if the encumbrance existed prior to the delivery of the deed: *Marbury v. Thornton*, 82 Va. 702.

PHELAN v. NORTHWESTERN LIFE INSURANCE CO.

[113 NEW YORK, 147.]

PRESUMPTION. — ADDRESS ON ENVELOPE WILL BE PRESUMED TO CORRESPOND TO ADDRESS ON LETTER, in the absence of evidence to the contrary.

LETTER WILL NOT BE PRESUMED TO HAVE REACHED PERSON to whom it was addressed on the day of its date, nor at any time earlier than it is actually shown to have been in his possession, when it is found among his papers after his death, but is addressed to him at a place other than his regular post-office address.

FORFEITURE OF INSURANCE. — NOTICE TO THE HOLDER OF A POLICY OF INSURANCE stating that a certain premium, giving the amount, will fall due at a designated time and place; that the conditions of his policy are, that payment must be made on or before the date the premium is due; that members neglecting to pay are carrying their own risks; that agents have no right to waive forfeitures; and that prompt payment is necessary to keep his policy in force, — is not sufficient to work a forfeiture of a life insurance policy under the statutes of New York, which declare that "no life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom it is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void."

ACTION on policy of life insurance. Judgment in favor of the defendant by the trial court was affirmed by the general term.

Raphael J. Moses, Jr., for the appellant.

David Willcox, for the respondent.

DANFORTH, J. The defendant is a life insurance company organized under the laws of Wisconsin, but doing business in the state of New York. On the 31st of March, 1880, it issued a policy of insurance upon the life of George P. Phelan. The premiums were payable on or before the thirty-first day of March, June, September, and December in each year, and the policy contains a provision that if the premiums are not paid at the times mentioned, the policy shall cease and determine. The premium that became due December 31, 1882, was not paid. It was tendered to the company about two o'clock on the 15th of January, 1883, but was refused. The insured

died on the night of that day. The plaintiff is his administratrix, and sues upon the promise contained in the policy, to pay the sum assured in sixty days after notice and proof of death of the insured.

It is obvious, upon the facts so far stated, that no recovery could be had, for the condition upon which the defendant was to be liable had not been performed; but the plaintiff relies upon the statute of this state regulating the forfeiture of life insurance policies: Laws of 1877, c. 321; and claims to enforce the policy upon the ground that the defendant failed to do that which the statute exacts as a condition of forfeiture. The statute (*supra*) declares that "no life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void"; and the statute provides that in case such payment is made within the thirty days limited therefor, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and declares that no such policy shall in any case be forfeited until the expiration of thirty days after the mailing of such notice. There is no pretense that this notice was given, but, on the contrary, the argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto. As to that, the provision is, that a notice stating when a premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner "above stated," at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the notice before provided for. That such notice had been given was a fact to be established by the defendant before its defense could be maintained, and whether it was so established is the only question on this appeal.

The defendant relies upon a paper found after the death of the insured among his effects, and reading as follows:—

"OFFICE OF THE
"NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

"MILWAUKEE, WIS., November 1, 1882

"GEORGE F. PHELAN, 37 Barclay Street.

"The 4 qr. premium of \$17.40 on your policy, No. 102,320, falls due at the office of the agent of this company in New York City, New York, before noon on the thirty-first day of December, 1882.

"The conditions of your policy are, that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures.

"Please present this notice at time of payment.

"Yours respectfully,

"J. W. SKINNER, Secretary.

"H. M. MUNSELL, General Agent Northwestern Mutual Life Co., 160 Fulton Street, Office cor. Broadway, New York City.

"Prompt payment is necessary to keep your policy in force."

No proof was given of compliance with the statutory provision in regard to the mailing of the notice, but the argument of the respondent is, that the regularity of its proceedings in those respects is to be inferred from the fact that the notice was found among the papers of the deceased. The evidence is insufficient for that deduction. It appears that the residence of the deceased at the time the notice should have been given was 45 Warren Street, New York; that the company had been apprised of that fact, and had so entered it upon their books. Moreover, the agent of the defendant testified that "the post-office address of Phelan appeared upon the books to be as above stated." The notice produced was not so addressed. It was addressed to him at 37 Barclay Street. It may be presumed that it reached that place in due course after it was mailed. But when was it mailed? There is no evidence as to that. The date is of no importance, and is evidence of no statutory fact. Within the cases cited by the respondent, it might, in a proper case, be presumed that its date represented the day it was prepared or written, but nothing more. Certainly it cannot be considered as just ground for inferring the wholly distinct and vital fact that it was put in the mail on that day, nor that the envelope was properly addressed. In the absence of other evidence, the presumption

is, the address on the envelope corresponded to the address in the letter. Nor does the fact that the notice was in the possession of the assured on the 17th of January, 1883, afford any ground for inference that he received it in due course of mail, nor that it was served upon him or received by him at any day earlier than January 17th.

We are also of opinion that the notice does not, in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that, in a declared event, "a policy will become forfeited and void," conveys a meaning easily to be comprehended. To refer to the policy and conditions, and say that "members neglecting so to pay are carrying their own risk," is quite another thing; and while it may be comprehensible to those versed in the language of insurers, and accustomed to their phraseology, it is not the language of the statute, and does not embody the notice which the statute requires. The principle upon which our decision in the recent case of *Carter v. Brooklyn Life Ins. Co.*, 110 N. Y. 15, rests applies, and requires that the appeal succeed.

The judgment of the court below should therefore be reversed, and a new trial granted, with costs to abide the event.
Judgment reversed.

MAIL. — A LETTER PROPERLY ADDRESSED AND MAILED is presumed to have been received by him to whom directed: *Russell v. Buckley*, 4 R. I. 525; 70 Am. Dec. 167; *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536; *Oregon S. Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; *Austin v. Holland*, 67 N. Y. 571; 25 Am. Rep. 246; *contra*, *Freeman v. Morey*, 45 Me. 50; 71 Am. Dec. 527, and note 529; note to *Commonwealth v. Jeffries*, 83 Am. Dec. 726, 727; *Sullivan v. Kuykendall*, 83 Ky. 483; 56 Am. Rep. 901; *First National Bank etc. v. McManigle*, 69 Pa. St. 156; 8 Am. Rep. 236.

EVERSON v. McMULLEN.

[113 NEW YORK, 293.]

DOWER — SUBROGATION. — If the purchaser of an equity of redemption pays a mortgage to which the wife of the mortgagor was a party, or gives a new mortgage in place of such mortgage, he becomes in an equitable sense the purchaser of the interest of the original mortgagee, and is entitled to be subrogated to the position of the mortgagee, and to stand in equity as the purchaser and holder of his security.

ACTION by the widow of Morgan Everson to recover dower. The question was whether her dower interest should be charged with its proportion of a mortgage in which she had joined with her husband. The general term on appeal had decided in favor of the plaintiff that she was not liable to contribute anything towards the satisfaction of the mortgage.

Howard Chipp, for the appellant.

G. D. B. Hasbrouck, for the respondent.

FINCH, J. We are required to settle on this appeal the disagreement between the trial court at the first hearing and the general term, and determine which decision was correct.

The property in question was owned originally by Morgan Everson, who mortgaged it to the Rondout Savings Bank for twelve thousand dollars; his wife, who is the present plaintiff, joining with him in the mortgage to cover her inchoate right of dower. Everson died soon thereafter, and his executor sold the equity of redemption at public auction for one dollar. The case does not disclose the authority upon which he acted, but nobody disputes it, and the action was tried upon the assumption that a valid title existed in the purchaser. That purchaser was Coykendall, who assigned his bid to Preston, to whom the executor's deed was made. Preston took title before August, 1877, and thereupon gave a new mortgage to the savings bank upon the property for two thousand dollars to further secure an accumulation of interest upon the original mortgage. It appears that Preston gave a bond accompanying the mortgage, and so became personally liable for a possible deficiency, and the bank gained that additional security for its unpaid interest; but while it is said generally that the mortgage was given to pay the interest, it is not shown that the mortgagee accepted the new securities as a payment *pro tanto* upon the original encumbrance by any indorsement or equivalent action, or held them in any other way than as collateral to the original debt. In August, 1877, Preston and

his wife conveyed to Crosby by a quitclaim deed, but containing a provision by which the latter assumed and agreed to pay the two-thousand-dollar mortgage given by Preston to the bank as a part of the consideration for the purchase. The consideration named in the deed was \$221. Preston did not on his purchase assume or become liable to pay any part part of the original mortgage, but took title merely subject to its lien. When he gave his two-thousand-dollar bond and mortgage it was in aid of his own title, and not in pursuance of any duty due to the representatives of the mortgagor. Probably his obligation was merely collateral to the primary lien, and so both he and his land became sureties for the unpaid interest; but if not, and the new mortgage was a payment of so much of the old debt, it was entirely voluntary, and he and Crosby, who took his place, stood in the attitude of sureties after paying the unpaid interest, entitling them to subrogation as against the land. Crosby thereafter conveyed a portion of the property to McMullen by a warranty deed free and clear of all encumbrance. He was enabled to do this by an arrangement at the time to which his grantee and the bank were parties. The substantial point of that arrangement was a distribution of the original mortgage in agreed proportions between the two parcels into which, by McMullen's purchase, the land was to be divided. To effect this separation and severance of the lien, McMullen gave the bank a mortgage on his parcel for five thousand five hundred dollars as a substitute for four thousand dollars of the principal of the original mortgage, and of the unpaid interest collaterally secured by the bond and mortgage of Preston, five hundred dollars of the interest having been paid in cash by Crosby. The bank on its part formally released McMullen's parcel from the lien of its original mortgage, indorsing thereon a payment of four thousand dollars, and canceled and discharged the two-thousand-dollar mortgage of Preston, and Crosby was thus enabled to make his conveyance free from encumbrance.

On this state of facts, the widow demanded dower in McMullen's parcel. The special term, on the first trial, held that she was bound to allow, as against her dower, a just proportion of the original mortgage and its interest, and sent the case to a referee to ascertain that just proportion, with a direction that the McMullen mortgage should be recognized and allowed in ascertaining the amount of such indebtedness. The general term, on the contrary, were of opinion that the

widow was not bound to contribute, and should have dower in the whole parcel, without allowance or diminution; and it is that controversy which awaits our judgment. It is not doubtful on which side the equity exists. The widow subordinated her dower to the payment of the husband's debt. Whoever, in the room of a foreclosure by the mortgagee, pays that debt to him when under no personal liability for its discharge, is entitled in equity to the protection of the mortgagee's right as against the dower which it covered and charged. The purchaser from the husband acquired only the equity of redemption. While technically he took the fee, in truth he took it subject to the interest of the mortgagee carved out of it by the mortgage as a lien. Payment to the mortgagee, in an equitable sense, is a purchase of that interest from him, and in equity the owner of the fee holds it under the mortgagee as to that interest, and under the husband only as to the equity of redemption. That is an answer to the doctrine invoked by the respondent, that a release of dower is available only to one who claims under the very title which was created by the conveyance with which the release is joined: *Malloney v. Horan*, 49 N. Y. 118; 10 Am. Rep. 335. That would be a good answer to the appellant's claim in a court of law, possibly, but does not govern his case in equity, since there the truth of his holding, outside of the legal form, is under the mortgage to the extent of the mortgage debt. For his payment of that debt is not a duty which he owes to the husband's estate or to any one, but a transaction in his own interest, the exact and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made, not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest, and seeking to add to that, as acquired from the husband, the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he, personally, was not bound to pay it, his land was held, and paying the debt of husband and wife as represented by the mortgage, he had a right, as against them, to be subrogated to the position of the mortgagee, and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment *pro tanto* of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant, in its practical effect, to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and so looking, cannot fail to see that the new mortgage is so much of the old one in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remains subject to the proportionate part of the original lien.

I think these views are fully sustained by the authorities. In *Swaine v. Perine*, 5 Johns. Ch. 491, 9 Am. Dec. 318, the mortgage given by the husband and wife was outstanding at his death; the equity of redemption passed to the heir, who redeemed the land by paying the mortgage, and the widow, who claimed dower, was required to contribute her ratable proportion of the redemption money. In *Popkin v. Bumstead*, 8 Mass. 491, 5 Am. Dec. 113, the husband and wife joined in a mortgage to one Capen, and after the death of the husband, his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage, and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred. This case, which is very like the one at bar, was cited in *Van Dyne v. Sayre*, 19 Wend. 171, with apparent approval. Judge Cowen reviews many of the cases, and holds that *Collins v. Torry*, 7 Johns. 278, 5 Am. Dec. 273, and *Coates v. Cheever*, 1 Cow. 475, were decided without full consideration. Near the close of his opinion he says: "My deduction from this and other cases I state in the words of Chancellor Kent (4 Com., 3d ed., 45), the wife's dower in the equity of redemption only applies in case of redemption of the encumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed." I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm rather than question the views we have expressed. In *Bartlett v. Musliner*, 28 Hun, 235, the purchaser had assumed and agreed to pay

the mortgage debt as a condition of his purchase, and having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in 1 Jones on Mortgages, sec. 866, where it is said that if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan v. Stewart*, 12 Barb. 537, the action was at law, and while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case Runyan and his wife gave a mortgage, and thereafter the husband gave a conveyance to Baker, who assumed the payment of the mortgage. The court question the case of *Popkin v. Bumstead*, *supra*, but add that in equity Baker might be subrogated and have a decree for contribution. No reference was made to the assumption of the mortgage by Baker. In *Jackson v. Dewitt*, 6 Cow. 316, there was a release to the mortgagee, and dower was denied. In *Wedge v. Moore*, 6 Cush. 8, the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt v. Brick*, 35 Hun, 127, the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled; that there was a right of subrogation; that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material only as showing a transfer rather than a payment, and where no payment was intended or made, but the mortgage debt subsisted in the new mortgage given, the result must be the same.

On the whole, I am satisfied that where the purchaser of the equity of redemption is not bound to pay the mortgage debt, but does, in fact, pay it in aid of his own title and estate, whereby it is discharged, the claim of dower is subject to a just contribution. And the case is stronger where, as here, the technical payment consists in the substitution of a new mortgage intended to operate as and take the place of so much of the old one. The debt to which the dower was subordinated is changed in form, but in fact remains, and the dis-

charged security may be revived when equity so requires: *Gans v. Thieme*, 93 N. Y. 225.

The judgment of the general term and of the special term should be reversed, and a new trial granted, costs to abide event.

Judgment reversed.

SUBROGATION, WHO ENTITLED TO: See *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783, and note. A stranger who, after judgment, and before execution was levied, paid the mortgagee a certain sum for a release of his lien, but who took no assignment of the mortgage or notes, is entitled to be subrogated to the rights of the mortgagee only to the extent of the sum paid: *Mallery v. Dauber*, 83 Ky. 239. Where H. bought on credit a tract of land from the county, and before payment of the purchase price, sold a part of such land to R. for cash, with the agreement that R. should pay two thirds of the indebtedness from H. to the county, and at the request of R., H. paid one of the purchase notes for the land to the county, and by agreement among the parties after the payment of this note, the bond to the county and H.'s deed to R. were surrendered, and deeds made by the county for R.'s part to him, and to H. for the rest of the tract, H., paying the notes as described above at the request of R., became subrogated to the rights of the county to enforce its payment: *Henson v. Reed*, 71 Tex. 726; for it is only when the payment of encumbrances is necessary to protect the rights of the payor, or when they are paid pursuant to an agreement that the payor shall hold them as security for the money advanced, that the payor will be subrogated to the rights of the holders of such encumbrances or liens: *White v. Cannon*, 125 Ill. 412.

PARSONS v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[113 NEW YORK, 355.]

RAILROAD IS NOT EXONERATED FROM LIABILITY by the fact that the injury complained of was the result of its engineer's being temporarily disabled from controlling his engine by an accident received from the lever, which slipped from its position after being reversed, and struck him a violent blow, if the remedies for such a fault on the part of the lever are so numerous and common that they must be presumed to be within the knowledge of all intelligent persons.

RAILROAD—NEGLIGENCE.—Reliance upon a lever which is liable to be forced from its place by the natural action of the machinery is an act of grossest carelessness.

NEGLIGENCE.—RAILROAD COMPANY IS NOT TO BE EXCUSED FROM THE CONSEQUENCES OF RUNNING TRAINS AT GREAT SPEED through stations or in the streets of a populous city by the impossibility of its servants to control the powers which propel them.

PASSENGER ON RAILROAD TRAIN DOES NOT LOSE HIS CHARACTER AS SUCH BY ALIGHTING from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the termination

of his journey. If he intends to return and continue his passage, he retains the right of being protected by the regulations which the company have provided for the safety of persons traveling on its cars and using its station-grounds; and if he is injured by the omission of the servants of the company to obey rules adopted for the protection of persons in his situation, it is liable for the injuries thus received.

CONTRIBUTORY NEGLIGENCE IN CROSSING RAILROAD TRACK. — If a railroad company has, by its conduct and its published regulations, led the public to believe that trains would not run on its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company, and are not necessarily guilty of negligence when injured by prohibited trains while so doing.

CONTRIBUTORY NEGLIGENCE WILL NOT BE IMPUTED, AS A MATTER OF LAW, to a person injured by a railway train merely because it was possible for him to have discovered its approach. The question is, whether the injured party, under all the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances.

EVIDENCE. — If EVIDENCE IS COMPETENT FOR ANY PURPOSE, an objection to it cannot be regarded as well taken, although counsel who sought to introduce it claimed it to be admissible on an erroneous ground.

IF IMPROPER EVIDENCE HAS BEEN ADMITTED WITHOUT OBJECTION, the only remedy of the opposing party is to move to strike such evidence out.

ACTION to recover for the death of Thomas Murphy, plaintiff's intestate. Judgment for the plaintiff entered by the trial court was affirmed by the general term.

George C. Greene, for the appellant.

Charles B. Wheeler, for the respondent.

RUGER, C. J. The evidence in the case was on some points conflicting, but the jury were authorized to find, and upon the defendant's appeal we must presume that they found, the facts in conformity with the plaintiff's proof. By this it appeared that the plaintiff's testator was run over and killed, at the Ferry Street station, in the city of Buffalo, by the engine of a freight train, belonging to the defendant, moving south-erly at the rate of from twenty to thirty miles an hour. He was a passenger on a train going northerly from the Exchange Street station, Buffalo, to La Salle, and beyond, and had traveled three miles of the distance when he reached the Ferry Street station, where the train was accustomed to stop for the purpose of taking on and letting off passengers. As the passenger train reached the station-house, after it had been called by the brakeman, and while it was going slowly, but had not yet entirely stopped, the deceased stepped down from the second car upon its westerly side upon a plank walk, or plat-

form, and proceeded along by the side of the moving train for some forty or fifty feet, when he attempted to cross over the westerly track. Before this, the passenger train had entirely stopped. When he reached a point about ten feet from the passenger train, and being then between the rails of the westerly track, he was struck by the engine of the freight train, which was backing down in a rapid manner. The whole transaction occurred in front of the station-house, and within the station-yard, upon ground where passengers were accustomed to pass and repass in going from and coming to the trains. The rules of the defendant required freight trains to approach stations slowly, and to stop before reaching stations at which a passenger train is landing or receiving passengers. The freight train came from the north, and at the distance of about three hundred feet from the station was visible, although partially concealed from the view of those standing at the station by a curve in the road, and also by trusses upon a bridge over Ferry Street, running immediately north of the station grounds, which trains going south were obliged to cross before reaching the station. The deceased was, when struck, about twenty feet south of the bridge. He was seen walking quite rapidly to the north, in the direction of the approaching train, when he turned and started to go across the track, and as he saw the train, attempted to jump, but failed to prevent a collision, and was struck while in the act of jumping to avoid it. It did not appear for what purpose the deceased was going across the westerly track; but it was stated that he sometimes got off and communicated with relatives or friends, who lived next the station-yard, on the west side, as he passed over the road.

As the deceased walked along the track, he was necessarily looking in the direction from which the freight train was approaching, but no positive proof was given that he looked towards it immediately before he was struck, and it is not probable that he could have seen it if he had looked when he first alighted, or for some seconds thereafter. Not to exceed ten seconds elapsed between the time when he alighted from the train and that when he was struck, and during that time the engineer of the passenger train was exhausting its steam, making a loud noise. The freight train was running probably at the rate of forty feet a second, and when the deceased first alighted, was probably beyond the line of his vision.

We are of the opinion that the case was, in all of its aspects,

one for the jury. The point made by the appellant that there was a variance between the cause of action proved and that laid in the complaint is not well taken. The complaint stated all of the facts necessary to maintain the action, and complied with the requirements of the code in that respect. Evidence was given tending to support the allegations of the complaint, and it was for the jury to find whether they had been proved or not.

The contention that the negligence of the defendant, as alleged, consisted only of its omission to perform the duty which it owed to the deceased as a passenger is founded upon a misconstruction of the language of the complaint. We think it immaterial whether the deceased, when he alighted from the passenger train, ceased to be a passenger or not. He was certainly neither a wrong-doer nor trespasser by so doing. He might thereby have subjected himself to increased risks, for which he would have no redress against the railroad company, but if he should be afterwards killed by the gross negligence of the company without fault on his part, the company would be liable. This was the case stated by the complaint. The defendant also claims that it was not negligent in running its freight train through the station at a high rate of speed while a passenger train was there engaged in taking on and loading passengers. This claim is mainly based upon evidence that the engineer in charge was temporarily disabled from controlling his engine by an accident received from the lever, which slipped from its position after being reversed, and struck him a violent blow. The argument is, that the engineer had performed his whole duty in respect to stopping the train, by reversing the lever and shutting off steam. Some evidence was given for the defendant, by its employees, that they were not cognizant of any means of retaining the lever in its place after being reversed, except what were in use on this engine. Other experts, however, gave evidence tending to show that such an accident could not occur if the lever was properly reversed, except from a defective appliance. It, however, requires no expert to determine these facts, for it is obvious to the most ordinary comprehension that a reliance upon a lever which is liable to be forced from its place by the natural action of the machinery in a matter of such importance is an act of the grossest carelessness. The remedies for such a fault are so numerous and common that they must be presumed to be within the knowledge of all intelligent persons.

We think it an alarming proposition to assert that a railroad company is to be excused from the consequences of running trains at great speed through stations, or in the streets of a populous city, because of an impossibility of its servants to control the powers which propel them. If this lever was liable to be displaced by the working of the machinery, it was the plain duty of the engineer to hold it in its position until the stoppage of the train had produced a compliance with his instructions, and removed the danger. This would have required his attention for possibly ten seconds of time. The negligence of the company in running its train through the station at a high rate of speed is recognized by the rules of the company, and it is too obvious to require discussion.

A more difficult question arises over the allegation of contributory negligence on the part of the deceased. We do not think that a passenger on a railroad train loses his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. It cannot properly be said, we think, if a passenger leaves a train for the purpose of obtaining refreshments at a regular station, or transacting business during its stay there, but intending to return and continue his passage, ceases to be a passenger, or loses the right of being protected by the regulations which the company have provided for the safety of persons traveling on its cars and using its station-grounds. He may not stand upon the tracks or go thereon without using the care and caution required of prudent persons under the circumstances of the case; but if a person under such circumstances is injured by the omission of the servants of the company to obey rules adopted for the protection of persons in that situation, we think it becomes liable for injuries thus received.

The rule which prescribes it to be the duty of persons to exercise care and caution in going upon railroad tracks, and to use their senses of seeing and hearing for the purpose of discovering and avoiding dangers, is one frequently found in reported cases, and, as a general rule, is salutary and just. But the duty of active vigilance must be adapted to the circumstances of the case, and if the offending company has by its own conduct and by its published regulations led the public to believe that trains would not be run on its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company,

and are not necessarily guilty of negligence when injured by prohibited trains while doing so. The deceased was justified in supposing that no rapidly moving train would come into the station while he remained in the yard and was engaged in communicating with his friends on the west side. He had frequently done so before, and had been lulled into a sense of security by the immunity which he had before enjoyed and the reliance which he placed upon the care exacted of its servants by the railroad company. It is quite doubtful whether he was able to see the freight train until he approached near the place where he started to cross the westerly track, as it was presumptively approaching at the rate of at least forty feet per second, and the jury were justified, from the evidence, in finding that he had looked in the direction in which he was walking, and did not see the train. That he did not hear it is quite conceivable, as the exhaust steam of the passenger-engine made considerable noise, and the witnesses generally agree that no one saw or heard the freight-engine until it got upon the bridge, and after that, it passed the station in an instant of time. Having once looked, and seeing no train, he had a right to assume that none would be coming at such a rate of speed as would preclude him from crossing a single track. It is probably true that if he had looked both ways at the moment of stepping upon the track he could have seen the approaching train; but that might be said of almost every accident of a similar character, and is a degree of vigilance seldom adopted by any one, and would require the impossible feat of looking in opposite directions at the same time, or anticipating the point from which he was to be assailed. The law does not require this; neither is there any rule which will defeat a recovery in cases of this kind merely because it was possible for an injured person to discover an approaching train. The law does not forbid persons from crossing railroad tracks, or impose upon them exclusive responsibility for damages incurred in making such an attempt. The question is, whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury.

We think the jury could properly find that the deceased did, under the circumstances of this case, exercise such care

and caution as exempted him from the imputation of negligence: *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York Cent. etc. R. R. Co.*, 84 Id. 241; *Archer v. New York etc. R. R. Co.*, 106 Id. 589.

The defendant also claims that the court improperly allowed the plaintiff's counsel to cross-examine the witness Marsh and prove why he was discharged from the defendant's employ some eighteen months after the accident in question. The question objected to was: "What was the occasion of your going when you did go?" This question was competent on the question of the witness's credibility, and if competent for any purpose, the objection to it was not well taken, although counsel claimed it to be admissible on an erroneous ground. The witness did not answer this question, and the question was then put, "What was the occasion of your leaving the company's employ?" This was not objected to, and the witness answered, "I was coming into Black Rock yard with a coal train, and had a collision with a switch-engine pulling off the branch with another train." Question: "Did they discharge you for it?" Answer: "Yes, sir." The defendant then made its objection, and took its exception. The evidence was then already before the jury without exception, and the defendant's remedy was to move to strike the evidence out. This he did not do. We think, therefore, the defendant did not raise the question properly; but if we were of the contrary opinion, we should not be inclined to reverse the judgment upon this ground. If the evidence tended in any way to injure the defendant, it was upon the question of the negligence of the defendant. This was established by evidence beyond dispute, and the testimony of this witness could not be said to have affected it. All of the evidence goes to show that the defendant ran its train at a high rate of speed through a crowded station in violation of its published rules.

There was practically no question for the jury in respect to the question of the defendant's negligence.

The case was submitted to the jury upon a charge eminently favorable to the defendant, and we think it had no reason to take exception to it.

Some few other exceptions were taken to the rulings of the trial court in the admission of evidence, but we think no errors were committed which authorize the reversal of this judgment.

The judgment should therefore be affirmed.

Judgment affirmed.

RIGHTS OF PASSENGER ALIGHTING TEMPORARILY. — A passenger on a railway who purchases a ticket for a distant station, and gets off the train temporarily, and without objection or notice, while it is stopping at an intermediate station, does no illegal act, but for the time being surrenders his place and rights as a passenger on the train, but he may return and resume his place and rights as a passenger on the train before its starts, and the officers of the railway are bound to give reasonable notice of the starting of the train: *State v. Grand Trunk R'y*, 58 Me. 176; 4 Am. Rep. 258.

NEGLIGENCE, CONTRIBUTORY, WHEN A QUESTION OF LAW AND WHEN A QUESTION OF FACT: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note; *Baltimore etc. R'y Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note; *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84; 9 Am. St. Rep. 457, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; *ante*, p. 67, and note.

CARE REQUIRED OF CARRIERS OF PASSENGERS. — Common carriers must have and use all means to prevent injuries to passengers from any danger that can be reasonably anticipated, but are not liable for injuries resulting from occurrences that could not be reasonably foreseen: *Pittsburgh etc. R. R. Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224. Carriers of passengers are required to use the highest degree of practical care and diligence which is consistent with the mode of transportation: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; 68 Am. Dec. 323; *Tuller v. Talbot*, 23 Ill. 357; 76 Am. Dec. 695; *Deyo v. New York etc. R. R. Co.*, 34 N. Y. 9; 88 Am. Dec. 418; *Sawyer v. Hannibal etc. R. R. Co.*, 37 Mo. 240; 90 Am. Dec. 382; *Simmons v. New Bedford etc. S. Co.*, 97 Mass. 361; 93 Am. Dec. 99; note to *Hurt v. St. Louis etc. R'y Co.*, 4 Am. St. Rep. 381. Carriers of passengers must use extraordinary diligence, and the presumption of negligence is always against the carrier when an injury is suffered: *City etc. R'y v. Findley*, 76 Ga. 311.

IN THE MATTER OF WELLS.

[118 NEW YORK, 396.]

A LEGACY OR DEVISE LAPSES AND BECOMES VOID by the rules of the common law, if the legatee or devisee fails to survive the testator.

A TESTATOR IS NEVER SUPPOSED TO INTEND TO GIVE TO ANY BUT THOSE WHO MAY SURVIVE HIM, unless he expresses such intention in unmistakable language.

INTENTION THAT A LEGACY SHALL NOT LAPSE is not manifest from the fact that the testator, after making the legacy and naming the legatee, adds these words: "To have and to hold the same to them, their heirs and assigns forever." This rule remains applicable in the state of New York, notwithstanding the provisions of its statutes, under which words of inheritance are no longer necessary to convey a fee, and are mere surplusage when used in wills or in deeds.

EXTRINSIC EVIDENCE IS ADMISSIBLE TO AID IN THE EXPOSITION OF A WILL only in those cases where from some ambiguity or obscurity a difficulty arises in applying the words of the will to the subject-matter of a devise or legacy.

EVIDENCE THAT THE LEGATEES WERE THE NEXT OF KIN of the deceased husband of the testatrix, from whom she had received all her estate, is not

sufficient to give the words any other than their ordinary signification, nor to prevent the lapse of any of such legacies upon the death of the testatrix prior to that of the legatee.

APPEAL from a decree of the surrogate court of Seneca County settling the final account of Samuel B. Wells, sole executor of the estate of Eunice B. Cooke, deceased.

Edward N. Shepard, for the appellant.

Charles A. Hawley, for the respondents.

GRAY, J. The testatrix, after making a devise of certain real estate and certain bequests, by the tenth clause of her will disposed of all of the rest, residue, and remainder of her estate by giving one eighth part thereof to each of five persons named, and one eighth part to the children of each of three other persons. After stating the legatee or legatees of each eighth part, testatrix added these words: "To have and to hold the same to them, their heirs and assigns forever." Four of the persons named as legatees died after the making of the will and before the testatrix, and this controversy arose as to whether the legacies to them lapsed, and whether as to such parts the testatrix has died intestate. The appellants, who are the heirs and representatives of the deceased legatees, argue that there was no lapse, and they found their argument upon the *habendum* clause just quoted from the will, and upon what they deem to be evidences of a contrary intention of the testatrix. That evidence they glean entirely through a consideration of certain extrinsic circumstances. The estate of the testatrix had come entirely from her deceased husband, with whom she had lived some forty-five years. She died at an advanced age, leaving neither parent nor descendant, and the persons whom she selected as her residuary legatees were all the next of kin of her deceased husband, being his brothers and sisters, and the children of two brothers and of a sister deceased.

Those facts are relied upon by the appellants, when considered together, as constituting some evidence of an intention of the testatrix to treat the bulk of her estate as a moral trust from her husband, and to return it to his relatives. They then argue that, reading in that light the words "to have and to hold to them, their heirs and assigns forever," a force and significance are imparted to them which generally they would not possess. They say that they must be taken to have been meant by the testatrix to be operative as substitutional words,

whereby the heirs of any person entitled will, upon his death, stand in his place.

We cannot, however, concede to these words the meaning contended for. The established principles of construction in such cases forbid it. In the absence of express words to prevent a lapse, or of something in the context to indicate a contrary intention, we should give to the words in this *habendum* clause their usual and primary meaning, in accordance with a general rule in the construction of wills. At common law, a legacy or a devise lapsed and became void where a legatee or devisee failed to survive the testator. The reason for the rule was, that a will, in its nature, is ambulatory, and does not become operative until the death of the testator, and until that event the legacy has never vested: 1 Jarman on Wills, 338; 2 Williams on Executors, 1084. In *Corbyn v. French*, 4 Ves. 418, 435, the master of the rolls (Lord Alvanley) said: "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear." Such an intention cannot be said to be made clear by the addition of the word "heirs"; for that is a word of limitation, used to describe the nature and duration of the estate given, and, as Mr. Jarman observes in his valuable work (volume 1, chapter 11), the doctrine of lapse "applies indiscriminately to gifts with and without words of limitation." This rule of the common law with respect to the lapsing of a legacy or devise was not abrogated, but it was modified, by the Revised Statutes of New York to this extent, that where the devise or bequest is to a child or descendant of the testator who dies in his lifetime leaving a descendant who survives the testator, the estate or interest given vests in the descendant of the legatee or devisee: 2 R. S. 66, sec. 52; *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290. It is apparent that the statute assumes that but for its provisions the devises or legacies in the case of the predecease of the devisee or legatee would have lapsed. Words of inheritance are now unnecessary to convey a fee, and are, indeed, mere surplusage, whether when used in will or in deeds. That fact, however, is not a sufficient reason for us to import into their use the expression of an intention that they shall be taken as words substituting in place of the predeceased legatee or devisee his heirs. Where words like these have a well-settled and well-understood meaning, we should not invest them with a different one, unless we are forced to do so by a conviction based on some

stronger support than that which is afforded by suggestion or speculation, however plausible.

Some evidence of extrinsic circumstances was admitted, and I have referred to the evidence above; but that is as inconclusive as it seems to be improperly in the case. If there was room for the belief that there was some obscurity in the language, if the meaning of the words used was ambiguous or obscure, and from the facts proved, an ambiguity was disclosed, evidence of circumstances or of declarations might find a proper place in the case to remove the obscurity or to give an effect to the ambiguous expressions: *Hiscocks v. Hiscocks*, 5 Mees. & W. 363. Lord Abinger, in the case cited, said that to ascertain the intention of the testator we should "read his will as he has written it, and collect his intention from his words." Mr. Wigram, in his work on wills, says that the legitimate purposes to which evidence of material facts is applicable are, "first, to determine whether the words of a will, with reference to the facts, admit of being construed in their primary sense; and secondly, if the facts of the case exclude the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense of which the words, with reference to the facts, are capable": O'Hara's ed., 2d Am. ed., 285. The rule is undoubted that evidence is admissible in aid of the exposition of a will in all cases where, from some ambiguity or obscurity, a difficulty arises in applying the words of a will to the subject-matter of a devise. In the will before us, I can perceive no obscurity in its language, nor doubtful meaning of the words used, and the admission of the extrinsic evidence does not introduce any difficulty or ambiguity in the case, or prevent us from applying the words of the *habendum* clause in their ordinary and primary sense.

There is no real reason arising from anything in the structure of this will why we should suppose that the testatrix meant anything more than what she has said. We must take the whole structure of the will together, and not dismember it, to discover what it accomplishes, and what it was meant to accomplish. We may assume, indeed, that the testatrix was aware of the effect of the predecease of a legatee; for we find, in the third clause of her will, in the case of a gift to her nephew, Nathan Crary, a provision that "in case he shall die before the receipt of said legacy, then the same shall go and be paid to his children," etc. Evidence of a similar understanding of the effect of the death of a legatee is sug-

gested by the reading of the language of the third clause of the codicil.

How can it be fairly argued, then, that a reason exists that the words in question, which possess a certain meaning, should be read in another than their ordinary sense? Is it because the testatrix ought morally, and therefore must be held to have intended, to convey the bulk of her estate to the relatives of her deceased husband? That is a sentimental reason, and it may explain as much as she did. But it cannot warrant our importing into her will another intention, which not only lacks support in expression, but may not, in fact, have been her intention, when we consider the fact that, in other cases of gifts, she has contemplated the effect of a possible predecease of the devisee, and has provided for its occurrence, so as to perpetuate them in the descendants of the donee. The words of this clause are most inapt to signify substitution. To give to them such a sense, we should have to disregard and cut out such words as "to have and to hold" and "assigns," and interpolate others. They are meaningless, if the clause is to be regarded as substitutional. No gift can vest in the donee until the death of testatrix. What, then, is the sense of "to have and to hold" or of "assigns"? There are cases where words, accompanying a gift to a person of a legacy or devise, are deemed disjunctive, and therefore substitutional; or they may be explanatory, and, with the aid of the context, plainly indicate that the gift shall not become void by the death of the first taker named in the will before the testator: *Gittings v. McDermott*, 2 Mylne & K. 69; *Hawn v. Banks*, 4 Edw. Ch. 664. Whenever a testamentary intention is clear and unequivocal, the courts go far to give it effect. They will convert "and" into "or," and construe words of limitation as words of purchase, or words of purchase as words of limitation: *Taggart v. Murray*, 53 N. Y. 233. Such was the case in *Matter of the Estate of Brown*, 93 Id. 295, where the court sustained a construction by which the issue of a deceased son might be admitted to participation in a remainder limited to him upon his mother's death. But there was justification for such a construction in the language used by the testator. It was: "Upon the death of any or either of my said daughters, I give . . . unto such child or children as my said daughter shall have or leave living at her decease; . . . that is to say, the children of my said daughters to have the part or share whereof the mother re-

ceived the rent and income during her life." It was thought that the insertion of the words "have or leave," with respect to the daughter's children, and that the addition of the latter portion of the clause I have quoted, when taken in connection with the principal sentence, disclosed the testator's purpose to let in the issue of children dying before their mother, testator's child.

The decision in *Van Beuren v. Dash*, 30 N. Y. 393, is a precise authority upon the question raised in the present case, and we see no substantial distinction between the two cases. There the insertion of the words "and their heirs," in a devise, was held to show the extent of the interest devised; and Denio, J., answered the argument that the devise was one in favor of the heirs of the devisees by reference to the case of *Brett v. Rigden*, Plowd. 340, and to its being the accepted authority in England. He also said: "It does not follow that because such words may now be dispensed with that, where they are inserted, their legal effect is different from what it would have been before the statute." In *Thurber v. Chambers*, 66 N. Y. 47, it was said of the presence of similar words in a will, that "although the use of them was unnecessary to vest a fee, it is quite common and the usual way in deeds and conveyances to insert them for greater certainty." In *Hand v. Marcy*, 28 N. J. Eq. 59, Chancellor Runyon, in a well-considered opinion, held that the addition of the words "their heirs and assigns" to a gift of the residue did not prevent a lapse, where a residuary legatee died in the lifetime of the testator, and that, as to so much of the estate disposed of by the residuary clause, the testator had died intestate. *Sword v. Adams*, 3 Yeates, 34, and *Sloan v. Hanse*, 2 Rawle, 28, are also decisions in point. Other authorities might be cited to show the universality of the rule as to lapse in similar cases, but it does not seem necessary. I think the appeal must fail. To sustain it we should have to make a new will, when we have no sure guide, and no other reason than the ingenious suggestion of a possible motive, or rather of one which the counsel says the testatrix ought to have entertained. Fairly considered, these words which have suggested to the appellants their ground for contention were but a common or an intensified form of expression of an absolute gift. It was an expression consistent with the gift of an absolute ownership, but in no wise indicative of a direction to transfer the part given to a legatee to his heirs or personal representatives, in the event of his failing to survive the testatrix.

The judgment of the general term should be affirmed, with costs to the respondents, to be paid out of the estate.

Judgment affirmed.

WILLS — LEGACIES LAPSED. — Property devised or bequeathed to a person who is dead when the will is made, or who dies before the testator, does not pass to such person's heirs; if personalty, it goes to the residuary legatee; if realty, it descends to the heirs of the testator: *Gore v. Stevens*, 1 Dana, 201; 25 Am. Dec. 141; *Spence v. Robins*, 6 Gill & J. 507; 26 Am. Dec. 587; *Birdsall v. Hewlett*, 1 Paige, 32; 19 Am. Dec. 392; *Helms v. Franciscus*, 2 Bland, 244; 20 Am. Dec. 402; *Comfort v. Mather*, 2 Watts & S. 450; 37 Am. Dec. 523; *Bendall v. Bendall*, 24 Ala. 295; 60 Am. Dec. 469; *Cureton v. Massey*, 13 Rich. Eq. 104; 94 Am. Dec. 152. In some of the states this rule is modified by statute. Thus section 1310 of the Civil Code of California declares that "when any estate is devised to any child or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator." For general discussion of lapsed legacies, see *Helm v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402.

WILLS, CONSTRUCTION OF — EXTRINSIC EVIDENCE. — Extrinsic evidence is admissible to explain latent ambiguities in a will: *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53; *Breckenridge v. Duncan*, 2 A. K. Marsh. 50; 12 Am. Dec. 359; *Brownfield v. Brownfield*, 12 Pa. St. 136; 51 Am. Dec. 590; and to make plain the person who was intended to be the legatee where several persons are named: *Clark v. Cotton*, 2 Dev. Eq. 301; 24 Am. Dec. 279; *Powell v. Biddle*, 2 Dall. 70; 1 Am. Dec. 263. Where from the terms of a will the testator's intention cannot be ascertained, recourse must be had to extrinsic circumstances, which may aid in arriving at the intention of the deceased: *Ehrenberg's Succession*, 21 La. Ann. 280; 99 Am. Dec. 729. But where the language of a will is plain and unambiguous, such language must govern, and therefore extrinsic evidence is inadmissible to show that the testator meant other than what the language of the will plainly imports: *Warren v. Miltonberger*, 21 Md. 264; 82 Am. Dec. 573; *Vickery v. Hobbs*, 21 Tex. 570; 73 Am. Dec. 238; *Magee v. McNeil*, 41 Miss. 17; 90 Am. Dec. 354. Nor is extrinsic evidence admissible to show an intention of the testator other than that expressed by the words of his will: *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 16; *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708. Nor to show a patent ambiguity in the wording of the will: *Breckenridge v. Duncan*, 2 A. K. Marsh. 50; 12 Am. Dec. 359. Nor to correct mistakes in wills: *Avery v. Chappel*, 6 Conn. 270; 16 Am. Dec. 53. Where a testator devised property to H. township, and it appeared that there were many H. townships in the state, it was competent, in order to remove the obscurity in the testator's intention caused by extraneous circumstances, to show by extrinsic evidence that the testator resided in a certain H. township, and that he sustained certain relations to such H. township which he sustained to no other township of the same name: *Skinner v. Harrison Township*, 116 Ind. 139.

GOEBEL v. WOLF.

[113 NEW YORK, 405.]

IF THE ENJOYMENT OF A LEGACY IS POSTPONED, THE LEADING INQUIRY for the purpose of determining whether it vests or not is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like.

LEGACY, WHEN IT DOES NOT VEST. — If the only gift consists of a trust to divide at a future time, the gift is future, not immediate, contingent, nor vested, unless from the particular circumstances a contrary intention may be collected.

IN CONSTRUING A WILL, THE CONSTRUCTION SHOULD FOLLOW THE INTENT collected from the whole will; and the general rules adopted by the courts to aid the interpretation of wills must give way when, on a consideration of the scheme of the will, or of special clauses or provisions, their application in a particular case would defeat the intention.

A DEVISE OR BEQUEST WILL BE REGARDED AS VESTED, AND NOT CONTINGENT, if the property is devised to trustees to be by them divided among the children of the testator on the youngest attaining the age of twenty-one years, when it appeared there was reason for postponing their enjoyment until that time, and the income is directed by the testator to be invested "for the benefit of his children," and the trustees are directed "to invest the same for the benefit of my said children," and also "to pay and advance to each of my children as they respectively arrive at the age of twenty-one years, or as they shall respectively marry, the sum of three thousand dollars," and also directs that the *corpus* and accumulations shall be "divided equally among my children, share and share alike, after deducting all advances made as above provided to any of my children, so that each child may have and receive an equal share of my estate." Upon death of one of the children before the period of division arrives, his share vests in his heirs at law.

ACTION for the construction of the will of Andrew Froelich. At the time of his death, Froelich left surviving him a widow and four minor children. One of the latter subsequently died. By his will, he gave his property of every description to his friend Lewis S. Goebel and his brother Phillip Froelich, in trust, to take charge of his estate, and to pay taxes, assessments, and other moneys necessary to keep it in repair; to pay over one half of the net income to his wife quarter-yearly to support and maintain herself and their minor children, and in lieu of dower; to apply the remaining one half of such net income to the payment of mortgage liens upon his real estate, and after such payment to invest one half of said income upon bond and mortgage upon real estate in the cities of New York or Brooklyn for the benefit of his children; and upon the further trust to take charge of his store, fixtures, and stove-trimming business in the cities of New York and Newark, and his

foundry in the city of Brooklyn; to continue said business until his youngest child should arrive at twenty-one years of age, or so long as the net profits shall yield ten per cent upon an investment of fifty thousand dollars; to sell and discontinue the business whenever the trustees shall deem it for the best interests of his estate; to retain out of the net profits ten per centum thereof for the compensation of the trustees, in addition to their commissions as executors and trustees; to invest the net profits of the business upon bond and mortgage upon real estate, or to deposit the same in some savings bank of good standing; to convert all personal property not above-mentioned into money, and to invest the same for the benefit of his children in the same manner as the other moneys are directed to be invested; to pay and advance to each of his children as they respectively arrive at the age of twenty-one years, or as they respectively marry, the sum of three thousand dollars, and immediately upon the arrival of his youngest child at the age of twenty-one years, in case his wife should not then be living, to divide all his estate, real and personal, and the accumulations and interest, equally among his children, share and share alike, after deducting all the advances made as above provided among his children, so that each shall have and receive an equal share of his estate. In the event that his wife should be living when the youngest child arrived at the age of twenty-one years, then no division of the estate was to be made until after the death of his wife.

Josiah T. Marean, for the appellants.

Isaac Lawson, for the respondent.

ANDREWS, J. No exception was taken to the finding that, by the bill in question, a valid trust was created in the executors, as trustees, in all the real estate of the testator during the life of the widow and the minority of his youngest child. The validity of the trust to carry on the business, and in the personalty connected therewith, is conceded. We shall therefore assume, without examination, that the trusts in the will in their main aspects were legally constituted.

The counsel for the appellant does, indeed, present the point that the trust as to the one half of the real estate will terminate in the event of the death of the widow during the minority of the youngest child; but that event has not happened, and may never happen, and the consideration of the question

may properly be postponed until the exigency arises which will render its determination necessary.

The practical question in the case grows out of the fact that one of the four infant children of the testator living at his death has since died under age, without issue, during the trust term; and the point is, whether, by the true construction of the will, the children of the testator took, upon his death, a vested remainder in his real estate, dependent upon the termination of the trust, and also in the personal property embraced therein, or whether the remainder given by the will to the testator's children was contingent upon their surviving the term upon which the trusts were limited, and carries the whole estate to such of the four children—and those only—who outlive the prescribed period. On one construction of the will, each child took on the testator's death a future vested estate in the undivided one-fourth part of the father's property, descendible on the death of any child to his heirs or next of kin, although he may have died during minority, and during the trust period. On the other construction, the gift of the father's estate was to such children only as survived the trust term, so that if one died intermediate the death of the testator and the termination of the trust, the survivors would take the whole; or if three died, the entire estate would vest in the sole survivor, and this, although the deceased child or children might have married and left issue surviving at their death who also survived the period of division.

Two leading purposes of the testator in creating the trusts in his will are plainly indicated on the face of the instrument. The first was to provide an income for the support of his wife, and of his children during their minority. To accomplish this purpose, he provided that one half of the rents and income of his estate should be paid by the trustees to his wife in quarter-yearly payments, "for the support and maintenance of herself and my minor children." The second purpose was to postpone the division of his estate among his children until the termination of the trust term, and meanwhile to accumulate the income not given to his wife, and at the expiration of that period, to divide the *corpus*, with the accumulations, between his children. But the learned counsel for the appellant contends that the final gift to the children is so framed that only children living at the time of the division are to participate therein, or in other words, that the gift is future and contingent, and to the children as a class, so that, in accordance

with the general rule of construction in such cases, only such persons of the class as are in existence when the contingency happens upon which the remainder is limited are comprehended: *Doe v. Sheffield*, 13 East, 526; 1 Jarman on Wills, 5th ed., 341.

The clause upon which the appellant relies to sustain the construction that the gift was to the children as a class, and was intended for such children only as should be living at the termination of the trust, is as follows: "And upon the further trust, immediately upon the arrival of my youngest child at the age of twenty-one years, in case my wife shall not then be living, to divide all my estate, real and personal, and the accumulations of interest, equally among my children, share and share alike, after deducting all advances made, as above provided, to any of my children, so that each of my children shall have and receive an equal share of my estate. Should my wife be living at the time my youngest child arrives at the age of twenty-one years, then it is my will and pleasure that no division of my estate shall be made until after the death of my said wife."

When a devise is made or a legacy given of which the enjoyment is postponed, "the leading inquiry upon which the question of vesting or not vesting is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future or contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like": Denio, J., in *Everitt v. Everitt*, 29 N. Y. 67. In harmony with this general rule, another general proposition has been formulated, that where the only gift is found in a direction to divide at a future time, the gift is future, and not immediate; contingent, and not vested: *Leake v. Robinson*, 2 Mer. 363; *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 Id. 92. The latter principle is invoked in this case. There is in the will no gift, in terms, to the children of the testator, except in the clause of the will above quoted, providing for a division of his estate among his children on the termination of the trust. But the rule invoked, as others of like character, is subordinate to the primary canon of construction, that the construction shall follow the intent, to be collected from the whole will; and that the intention of the testator so ascertained must prevail; and that general rules adopted by the courts in aid of the interpretation of wills must give way when, on a consideration of the scheme of the will, or of special clauses or

provisions, their application in the particular case would defeat the intention. This was recognized by Sir William Grant in the case cited from Merivale's reports, who, after stating the general rule that where, in a will, there is no gift, except in a direction to divide at a future time, the gift is contingent, and not vested, adds the qualification, "unless from particular circumstances you are able to collect a contrary intention." Many important exceptions have been ingrafted on the rule by the adjudged cases, which are stated in the elementary treatises, and some of which are specially considered in *Smith v. Edwards, supra*.

In the present will there is, as we have said, no immediate gift, in terms, of the remainder to the children of the testator living at his death. The question, therefore, is, whether, upon the whole will, such an intention can be collected. We think that, taking the whole will together, it was the intention of the testator to vest his estate at his death in his then living children, subject to the trust estate in his executors. There is nothing on the face of the will to indicate that the testator contemplated the death of any of his children during minority, or that any of them might not take the equal one-fourth share of his estate on the final division. The gift of the ultimate estate is not, in terms, to his children living at the time of the division, or to the survivors of his children, but the division is directed to be made "among my children, share and share alike." Words of survivorship were not necessary if the gift, by construction of law, was to the children who should be living at the time of division. But it would have been very natural that words of survivorship should have been inserted to emphasize his intention if the testator had intended that only children surviving at that time should be entitled to his estate. The division was to be made "immediately upon the arrival of my youngest child at the age of twenty-one years," etc. This language, in connection with the other provisions of the third or trust clause of the will, is most consistent with the construction that the time was fixed to define the period of enjoyment of his estate by his children, rather than the period of the vesting of the shares. There was a manifest propriety in postponing the enjoyment by the ultimate beneficiaries of one half of the real estate to accomplish the testator's purpose to provide an income for the support and maintenance of the widow and minor children. There was also a good reason for postponing the enjoyment of the other

half for the purpose of paying meanwhile the mortgages and encumbrances out of the income, which the testator directed should be done. The income, after this purpose had been accomplished, the testator directed should be invested for the "benefit of my children." A similar direction was given in respect to the net profits of the business, which he authorized the trustees to carry on after his death. They were to be invested for the "benefit of my children." There is nowhere in the will any suggestion that the testator had in view any particular children or surviving children, or children other than the whole number, in any clause or provision of the will. But what is quite significant on the point whether the testator intended a vested gift of a future estate to his children living at his death, is the fact that the personal property, not connected with his business, he gave to his children in terms which are conceded to have passed an immediate, absolute title in possession on the testator's death. But the gift was accompanied by a direction to his trustees "to invest the same for the benefit of my said children," using the same language to designate the beneficiaries as in the prior cases. But more significant still of the intention of the testator is a provision directing the trustees to "pay and advance to each of my children as they respectively arrive at the age of twenty-one years, or as they respectively marry, the sum of three thousand dollars," and later on, in the clause relating to the division, the testator directs that the division of the *corpus* and the accumulations shall be made "equally among my children, share and share alike, after deducting all advances made as above provided, to any of my children, so that each child may have and receive an equal share of my estate." It thus appears that the testator had in contemplation the possible marriage of one or more of his children during minority, and of course possible issue, and next, that he treated the shares of his children as separable and distinct, and any advance which might be made, under the will, to a married minor child as a charge on his or her share, to be accounted for in the subsequent division. The purpose of the charge, "so that each of my children shall have and receive an equal share of my estate," implies ownership of the share against which the advance is to be charged. In *Everitt v. Everitt*, *supra*, the circumstance that advancements were authorized to be made to children before the period fixed for the division was considered as indi-

cating an intent that the shares should be vested on the death of the testator.

On the whole, we are of the opinion that the intention of the testator, as derived from a consideration of the whole will, was to vest in each child living at his death an equal share of his estate, subject to the trust during the specified time, and that no settled rule of construction forbids giving effect to such intention. The circumstances collectively point to this construction. The constitution of the trust was convenient to accomplish intermediate purposes between the testator's death and the final division, viz., the securing of support and maintenance to his wife and minor children; the payment of mortgages and encumbrances; the carrying on of the business for the benefit of the estate; the accumulation of surplus income during the minority of the children. This construction also prevents the disinheritance of issue of any child who may marry and die before the expiration of the trust period, — a consequence which no one can doubt the testator never intended. The four children were in the testator's mind when he made the will, and in all the dispositions and provisions, the children, "my children," were the objects, selecting none and excluding none, and in the provision for advances the share of each was treated as vested and subject to charge.

The provision for accumulation became inoperative as to the share of the deceased minor child upon his death. An accumulation is only permitted for the benefit of living objects: *Bryan v. Knickerbacker*, 1 Barb. Ch. 409. We think the consequence of such death was to devolve the title to the one-fourth part of the estate in remainder upon the heirs at law and next of kin of the deceased child, according to the nature of the property, subject to the trust, and that they are likewise entitled to a like proportionate share of any income accumulated to the time of the death, and to such as shall hereafter accrue during the trust period.

These views lead to an affirmance of the judgment.

Judgment affirmed.

WILLS, CONSTRUCTION OF. — In construing a will, the testator's particular intent, shown by a single provision standing by itself must yield to the general leading intent, gathered from the whole instrument: *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92, and note 96. General intent of the testator, gathered from the whole will, must prevail over the rule that of two repugnant clauses the last will prevail: *Price v. Cole*, 82 Va. 343. In construing a will; all of its provisions must be regarded for the purpose of ascertaining the intention

of the testator, and if any particular paragraph of the will indicates an intent varying from that which is manifest from a consideration of all the other provisions, the general intent must prevail: *McMurray v. Stanley*, 69 Tex. 227.

WHEN LEGACIES ARE VESTED, AND WHEN CONTINGENT. — *Distinction between Terms "Vested" and "Contingent," as Applied to Legacies.* — It has been said that perhaps no question can arise in the course of legal inquiries more doubtful in its nature, or less referable to fixed and certain rules and principles, than whether the words of a devise or bequest constitute a vested or contingent interest: *Parker, C. J., in Shattuck v. Stedman*, 2 Pick. 469. And the apparent conflict among the numerous authorities upon the subject as to when a legacy is vested and when contingent would seem to be really due to the ever-varying language of testamentary instruments as affecting intention: See *Jennings v. Barry*, 5 Demarest, 531, 535; *Lamb v. Lamb*, 8 Watts, 184. The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like; *Everitt v. Everitt*, 29 N. Y. 39. And the general rule frequently stated in the authorities is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but where the gift is absolute, and the time of payment only is postponed, the gift is not suspended, but vests at once: *Van Wyck v. Bloodgood*, 1 Bradf. 154; *Ex parte Turk*, 1 Id. 110; *Scotfield v. Olcott*, 120 Ill. 362; *Warner v. Durant*, 76 N. Y. 133, 136; *Colt v. Hubbard*, 33 Conn. 281. This rule, though it amounts practically to saying that if the gift is future it is not present, has nevertheless been useful in drawing sharply the distinction between a gift presently given and its deferred payment: *Smith v. Edwards*, 88 N. Y. 92, 103. Briefly, a legacy is to be taken as contingent or vested, just as the contingency, if any, is annexed to the gift or to the payment of it: *Pennock v. Eagles*, 102 Pa. St. 290; *Major v. Major*, 32 Gratt. 819; *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588; *Muhlenberg's Appeal*, 103 Pa. St. 592. The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent: *McClure's Appeal*, 72 Id. 414. It is accordingly held that legacies payable at a future time certain to arrive, and not subject to a condition precedent, are vested; on the other hand, legacies only payable on an event which may never happen, and hence subject to a condition precedent, are contingent: *Scott v. West*, 63 Wis. 529, 566; and see *Taylor v. Mosher*, 29 Md. 443; *Dale v. White*, 33 Conn. 294; *Patterson v. Hawthorne*, 12 Serg. & R. 112; *Reed v. Buckley*, 5 Watts & S. 517; 40 Am. Dec. 531, and note 534; *Sutton v. West*, 77 N. C. 429; *Thomas v. Anderson*, 21 N. J. Eq. 22; *Beatty v. Montgomery*, 21 Id. 324. In the case last cited, it is held that whether a legacy is vested or contingent depends upon the event, and not upon the time. If the event is uncertain, the legacy is contingent, though the time is fixed; and if certain, the legacy is vested, although the time is uncertain: See also *Clayton v. Somers*, 27 N. J. Eq. 230; *Green v. Barron*, 10 Hare, 459; *Edwards v. Edwards*, 15 Beav. 357; *Whitton v. Field*, 9 Id. 368. According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent, unless it be annexed to the substance of the gift, or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened: *Loder v. Hatfield*, 71 N. Y. 92, 98; *Van Wyck v. Bloodgood*, 1 Bradf. 154; but see *Anderson v. Fel-*

ton, 1 Ired. Eq. 55. Thus where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed. But where the time is annexed, not to the payment only, but to the gift itself, as when the legacy is given to the legatee at twenty-one, or "if" or "when" he attains the age of twenty-one, the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent, and if the condition be not fulfilled, the legacy never vests: *Gifford v. Thorn*, 9 N. J. Eq. 702; *Clayton v. Somers*, 27 Id. 230; and see *Patterson v. Ellis*, 11 Wend. 260; *Hanson v. Graham*, 6 Ves. 239; *Snow v. Snow*, 49 Me. 159; *Colt v. Hubbard*, 33 Conn. 281; *Nixon v. Robbins*, 24 Ala. 663; *Watkins v. Quarles*, 23 Ark. 351; *Illinois etc. Loan Co. v. Bonner*, 75 Ill. 315; *Giles v. Franks*, 2 Dev. Eq. 521; *Roberts v. Brinker*, 4 Dana, 572; *Allen v. Whitaker*, 34 Ga. 6. This rule was adopted by the English jurists from the civil law at a comparatively early period; and it has been frequently applied by the courts both of England and of this country, as will appear from an examination of the cases already cited. And see *Colt v. Hubbard*, 33 Conn. 285; *Reed v. Buckley*, 5 Watts & S. 517; 40 Am. Dec. 531; *Locke v. Lamb*, L. R. 4 Eq. 372; *Bruse v. Charlton*, 13 Sim. 65, 68; *Phelps v. Phelps*, 28 Barb. 121; *Brown v. Brown*, 44 N. H. 281; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198.

Law Favors Vesting. — The doctrine that the law favors the vesting of estates is firmly established by authority: See *Crossman v. Crossman*, 6 Demarest, 148; *Scofield v. Olcott*, 120 Ill. 362; *Moore v. Lyons*, 25 Wend. 119, 142; *Harris v. Carpenter*, 109 Ind. 540; *Byrnes v. Stilwell*, 103 N. Y. 453; 57 Am. Rep. 760; *Letchworth's Appeal*, 30 Pa. St. 175; *McCall's Appeal*, 86 Id. 254; *Appeal of Ryon*, Sup. Ct. Pa., 1889. And wills should be construed in favor of vesting estates, if possible: *Toms v. Williams*, 41 Mich. 552; *Embury v. Sheldon*, 68 N. Y. 227; *Byrd v. Byrd*, 40 Pa. St. 182; *Meyer v. Eisler*, 29 Md. 28; *Lucena v. Lucena*, L. R. 7 Ch. Div. 255; *Martin v. Holgate*, L. R. 1 H. L. Cas. 175; *In re Orton's Trust*, L. R. 3 Eq. 374. If there are clear words of gift giving a vested interest to parties, the court will not permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which it is declared that the interest shall not arise: *Austin v. Bristol*, 40 Conn. 120, 136; 16 Am. Rep. 23; and see *Harrison v. Foreman*, 5 Ves. 209; *Weatherhead v. Stoddard*, 58 Vt. 623; *McLeod v. McDonnell*, 6 Ala. 236; *Foster v. Holland*, 56 Id. 474. And the principle is maintained, in accordance with the doctrine of the principal case, that where conditional words are used in a will which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator that the legacy should vest immediately, when it is apparent from other portions of the will that it should vest immediately: *Nixon v. Robbins*, 24 Ala. 663. So the gift of a legacy under the form of a direction to pay at a future time, or upon a future event, is not less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event. The question is one of substance, and not of form, and in all cases it is, whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question must be sought for out of the whole will, and not in the particular expressions in which the gift is made: *Leeming v. Sherratt*, 2 Hare, 14; *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588, and note 592. The construction of a will is to be made upon the entire instrument, and consequently all its parts are to be considered with reference

to each other: *Homer v. Shelton*, 2 Met. 194; *Hoxie v. Hoxie*, 7 Paige, 192; *Smith v. Bell*, 6 Pet. 68, 84. And although in all cases of doubtful construction the courts lean towards vested interests, yet where it appears from express declaration or clear inference that the testator intended to confine his bequest to those only who answer the description at the happening of a certain contingency, such intention must be carried into effect: *Austin v. Bristol*, 40 Conn. 120; 16 Am. Rep. 23. In other words, whenever the meaning can be ascertained, it must govern, whether it results in contingent or vested interests: *Olney v. Hall*, 21 Pick. 311; and see *Smith's Appeal*, 23 Pa. St. 9; *Knight v. Cameron*, 14 Ves. 389. The intention of the testator, as appearing from the whole will, must predominate over all technical words and expressions: *Major v. Major*, 32 Gratt. 819; *Lamb v. Lamb*, 8 Watts, 184, 186; *Kennard v. Kennard*, 63 N. H. 303.

The leaning of the courts towards a vested rather than a contingent interest is probably because testators generally have in view the immediate benefit of a legatee, though they may wish to postpone the actual enjoyment of it to a future period, when the legatee might make a better use of the testator's bounty: *Shattuck v. Stedman*, 2 Pick. 467; *Brown v. Brown*, 44 N. H. 281; *Vanhook v. Vanhook*, 1 Dev. & B. Eq. 589, 596.

General Rules as to Vesting of Legacies. — If a legacy be given generally, without appointing the time for its payment, it vests immediately upon the testator's death. It is an interest in *presenti solvendum in futuro*, and if the legatee dies before he is allowed to adopt coercive measures with a view to its recovery, yet his personal representative will be entitled to the legacy: *Marr v. McCullough*, 6 Port. 507; *Candler v. Dinkle*, 4 Watts, 143; *Dominick v. Moore*, 2 Bradf. 201; *Felton v. Sawyer*, 41 N. H. 202, 212. When, however, a period beyond the testator's death is prescribed by the will for the payment of the legacy, it often becomes a perplexing question whether it is vested or contingent. And in ascertaining the intention of the testator in this respect, it has become an established rule of construction that a bequest payable or to be paid at or when the legatee shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death; for the words "payable" or "to be paid" are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate in the same manner, in respect of its vesting, as if the bequest stood singly and contained no mention of time: *Major v. Major*, 32 Gratt. 819, 823; *Kimball v. Crocker*, 53 Me. 263; *Patterson v. Ellis*, 11 Wend. 259; *Thomas v. Anderson*, 21 N. J. Eq. 22, 26. Thus a bequest to a grandson of the testator of a sum of money, to be paid him when he shall attain the age of twenty-one years, vests at once on the death of the giver, and if the legatee dies before twenty-one, the money will go to his representative: *Brown v. Brown*, 44 N. H. 281; *Bowman's Appeal*, 34 Pa. St. 19. So a legacy to one "if he shall arrive at the age of twenty-one years, then to be paid over to him by my executor," was held to be a vested legacy: *Furness v. Fox*, 1 Cush. 134; 48 Am. Dec. 593; so a bequest to A, B, and C, at the marriage or decease of the testator's sister, to each a certain sum in cash, to be paid to them by his executor, is a vested legacy in A, B, and C: *Conwell v. Hearils*, 5 Harr. (Del.) 296; so a bequest of all the testator's personal estate to his wife and children, share and share alike, "each child to draw their share as they come of lawful age or marry," creates a vested legacy in the children: *Cox v. McKinney*, 32 Ala. 461; and to the same effect, see *Thrasher v. Ingram*, 32 Ala. 645; *Reed v. Buckley*, 5 Watts & S. 517; 40 Am. Dec. 531; *Gregg v. Bethea*, 6 Port. 9; *Higgins v. Waller*, 57 Ala.

396; *Verrill v. Verrill*, 68 Me. 318; *Teele v. Hathaway*, 129 Mass. 164; *Warren v. Hembree*, 8 Or. 118; *Tucker v. Ball*, 1 Barb. 95; *Landers v. Bartle*, 29 Hun, 170; *Bushnell v. Carpenter*, 92 N. Y. 270; *Smith v. Edwards*, 88 Id. 92; *Parsons v. Layman*, 4 Bradf. 269; *Young v. McKinnie*, 5 Fla. 548; *Emerson v. Cutler*, 14 Pick. 113; *Williams v. Clark*, 4 De Gex & S. 472. A legacy to A for life, and upon A's death to B, C, and D, is a vested legacy, and if B, C, and D die in the lifetime of A, their legal representatives are entitled, upon A's death, to their respective portions: *Beatty v. Montgomery*, 21 N. J. Eq. 324; *Allen v. Mayfield*, 20 Ind. 293. Compare *Austin v. Bristol*, 40 Conn. 120; 16 Am. Rep. 23; *Caldwell v. Kinkad*, 1 B. Mon. 228; *Pinney v. Fancher*, 3 Bradf. 198; *Betts v. Betts*, 4 Abb. N. C. 317; *Matter of Bogart*, 28 Hun, 466; *Raney v. Heath*, 2 Pat. & H. 206. And in a legacy to A, and if he dies before attaining the age of twenty-one then to B, the interest of B, though dependent upon a contingency, is transmissible. It would be otherwise, however, if the gift over was to B at twenty-one; for if he should die before attaining that age, he could never take, and could therefore have nothing to transmit: *Chase's Appeal*, 87 Pa. St. 362; 30 Am. Rep. 361; *Kelso v. Dickey*, 7 Watts & S. 279; and see *Barker v. Southerland*, 6 Demarest, 220. Where there is a gift to one person, and "in case of his death," then to another, the gift over is construed to take effect only in the event of the death of the first legatee before the period of payment or distribution: *Bishop v. McClelland*, 44 N. J. Eq. 450; *Baldwin v. Taylor*, 37 Id. 78.

Although time or other condition is annexed to the substance of the gift, and not merely to the payment, yet, when interest, whether by way of maintenance or otherwise, is given to the legatee in the mean time, the legacy will, notwithstanding the gift appears to be postponed, vest immediately upon the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed: *Provenchere's Appeal*, 67 Pa. St. 463, 466; *Bayard v. Atkyns*, 10 Id. 15, 20; *Robert v. Corning*, 89 N. Y. 225; *Warner v. Durant*, 15 Hun, 450; *Dupre v. Thompson*, 8 Barb. 537; *Green v. Green*, 86 N. C. 546; *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588; *Huston v. Read*, 32 N. J. Eq. 591; *In re Hart's Trusts*, 3 De Gex & J. 195. In other words, the gift of a legacy to be paid upon a future uncertain event, with a direction to pay to the legatee the interest accruing in the mean time, sufficiently indicates that it was not the testator's intention to make the legacy conditional: *Marr v. McCullough*, 6 Port. 507; and see *Nixon v. Robbins*, 24 Ala. 663, 669. The rule is otherwise, however, where the gift of interest or maintenance is distinct, and the direction is to pay or transfer the principal sum at the specified age, or upon the condition named: *Pleasanton's Appeal*, 99 Pa. St. 362; and see *Anderson v. Felton*, 1 Ired. Eq. 55; *Seabrook v. Seabrook*, 1 McMull. Eq. 201. So the rule applies exclusively to cases in which the entire interest or income is, in the mean time, to be paid to the legatee: *Matter of Baker*, 6 Demarest, 271; *Watson v. Hayes*, 5 Mylne & C. 125; *Harrison v. Grimwood*, 12 Beav. 192; compare *Fox v. Fox*, L. R. 19 Eq. 286. But where the testator directs a fund to be invested, and bequeaths the interest to A, and the principal, after A's death, to B, B takes a vested interest in the legacy at the death of the testator: *Barker v. Woods*, 1 Sand. Ch. 129; and see *King v. King*, 1 Watts & S. 205; 37 Am. Dec. 459; *Mull v. Mull*, 81 Pa. St. 393. And generally, where the benefit of a legacy is given for life to one, and after his death to another, the interest of the second legatee is vested, and his personal representatives would be entitled to the property, though he die in the lifetime of the per-

son to whom the property is bequeathed for life: *Conklin v. Moore*, 2 Bradf. 179; *Tarrill v. Public Administrator*, 4 Id. 245; *Bedell v. Guyon*, 12 Hun, 396; *Stuart v. Spaulding*, 30 Id. 21; *Matter of Accounts of Mahan*, 98 N. Y. 376; *Thornton v. Roberts*, 30 N. J. Eq. 473; *Naundorf v. Schumann*, 41 Id. 14; *Watson v. Quarles*, 23 Ark. 179. And although there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appears to be postponed for the convenience of the fund or property, as where the future gift is only postponed to let in some other interest, the bequest vests immediately, and will not be deferred to the period in question: *Peckham v. Gregory*, 4 Hare, 396; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198; *Brent v. Washington*, 18 Gratt. 526, 529; *Loder v. Hatfield*, 71 N. Y. 92; *Robert v. Corning*, 89 Id. 225, 240; *Little's Appeal*, 117 Pa. St. 14, 27; *McClure's Appeal*, 72 Id. 414. And although, as a general rule, legacies charged upon real estate do not vest until the time appointed for payment, yet if payment is postponed simply for the convenience of the estate, the legacy may vest, notwithstanding the death of the legatee before the time appointed for payment: *Lyman v. Vanderspiegel*, 1 Aiken, 275, 280; *Roberts v. Malin*, 5 Ind. 18; *Stone v. Massey*, 2 Yeates, 363; *Remnant v. Hood*, 2 De Gex, F. & J. 396, 410.

According to a well-settled rule of construction, a legacy given to a person or class to be paid or divided at a future time takes effect in point of right on the death of the testator. A legacy is deemed vested when there is a person in being at the time of the testator's death capable of taking when the time arrives, although his interest is liable to be defeated altogether by his own death, or to be diminished by future births: *Scott v. West*, 63 Wis. 529; and see *Estate of Hoffen*, 70 Id. 524; *Tucker v. Bishop*, 16 N. Y. 402; *Teed v. Morton*, 60 Id. 402; *Bowditch v. Andrew*, 8 Allen, 242; *Nunnery v. Carter*, 5 Jones Eq. 370; 78 Am. Dec. 231, and note 234; *McArthur v. Scott*, 113 U. S. 340. The words "give and bequeath" in a testamentary paper import a benefit, in point of right, to take effect upon the decease of the testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent: *Eldridge v. Eldridge*, 9 Cush. 516. And where words of contingency or condition are used which may be construed as applying either to the gift itself or to the time of payment, the courts are inclined to construe them as applying to the time of payment, and to hold the gift as vested, rather than contingent: *Dale v. White*, 33 Conn. 294. Many recent decisions illustrate the leaning of the courts in this direction. Thus where the bequest was, "I give to C., in trust for my son L, one thousand dollars, the interest to be used for his benefit until of lawful age, then the principal to be his, or his heirs and assigns forever," and L. survived the testator, but died during his minority, it was held that the property vested in L. upon the death of the testator: *Newberry v. Hinman*, 49 Conn. 130. So a testator bequeathed his property to his wife for life, and then as follows: "Upon the decease of my said wife, I give all my said estate to such of my children as may be living at the time of her decease, and to the issue of those who may have deceased." One of the testator's children died in his lifetime, leaving a child who died after the death of the testator, and before that of his widow, and it was held that such child had a vested interest under the will, to which his administrator was entitled after the death of the widow: *Austin v. Bristol*, 40 Conn. 120; 16 Am. Rep. 23; and to the same effect see *Martin v. Holgate*, L. R. 1 H. L. Cas. 175; *In re Orton's Trust*, L. R. 3 Eq. 374; and the earlier English cases of *Scott v. Earl of S.*, 1 Beav. 154; *Oppenheim v. Henry*, 10 Hare, 441; *Cooke v. Bowen*, 4 Younge & C. 244; see also *Tucker v. Bishop*, 16

N. Y. 402; *Dale v. White*, 33 Conn. 294. So a testator bequeathed all of his residuary estate to his wife for life, directing that at her death it should be equally divided among his children then living, and the issue of such as should be deceased. Before the widow's death, one of the sons died, leaving a daughter who survived the widow; and it was held that the remainder created by the will was vested, and that the share which the son would have taken would go to his personal representative: *Estate of Laguerenne*, 15 Phila. 553; citing in support of the rule *Womrath v. McCormick*, 51 Pa. St. 504.

So in *Mull v. Mull*, 81 Pa. St. 393, a testator gave the yearly interest of a sum to his wife for life, and after her death directed that "the principal shall be equally divided among all my children, or their legal heirs, if any of my children should die before such mentioned period doth arrive"; and it was held that the legacies to his children were vested. See also *Little's Appeal*, 117 Pa. St. 14. So a testator bequeathed his estate to trustees in trust for his daughter, with directions to apply, if necessary, the whole income to her education and maintenance, and when she should arrive at eighteen or be married, leaving it discretionary with the trustees whether or not to deliver to her the whole estate. In case the legatee died before eighteen, the estate was disposed of by bequests over. She was never married, and died at twenty-three, with the funds in the possession of the trustees. It was held that the daughter took a vested estate at least when she was eighteen, which, upon her decease, passed to her devisees: *Weatherhead v. Stoddard*, 58 Vt. 623. And in *Fox v. Fox*, L. R. 19 Eq. Cas. 286, there was a discretionary power in the trustees to apply the whole income of the fund, or so much thereof as they might from time to time think proper, for the maintenance and education of the legatees until their shares became payable, which was at twenty-one; and it was held that the legacy vested, and not the less so because there was a discretion conferred upon the trustees to apply less than the whole income for the purpose named. See also *Harrison v. Grimwood*, 12 Beav. 192. A will contained a provision as follows: "I place in the hands of M. bank shares to hold in trust until my son arrives at the age of thirty-five years, when my son comes in full possession of said bank stock." It was held that the shares vested in the son on the death of the testatrix, to be held in trust for his benefit till he should arrive at the age named: *Verrill v. Weymouth*, 68 Me. 318. A testator gave to his wife the use of all his property during her life, to terminate if she should marry again. The will then provided as follows: "At the death of my said wife, or at such time as she shall marry again, I give and bequeath to my son D. E. L. nine hundred dollars and my gold watch, and to my son D. C. L. one thousand dollars." The residue of his estate he gave to his daughter. In such case, the legacies to the two sons vested upon the death of the testator, and would not lapse by reason of their deaths during the life of the widow: *Landers v. Bartle*, 29 Hun, 170. A will contained a general residuary clause, wherein the testator gave and bequeathed to his aunt E. S. W., "for the exclusive benefit of her four children, the sum of two thousand dollars, the interest and principal, if necessary, to be used for their education." It was held that the title to the fund was vested in the four children in equal shares, subject to the execution of the trust, which would terminate as to each share when the owner thereof was educated, or attained the age of twenty-one years: *Matter of Lapham*, 37 Hun, 15. Among earlier instances of vested legacies are the following: *High v. Worley*, 32 Ala. 709; *Harris v. Fly*, 7 Paige, 421; *Sears v. Putnam*, 102 Mass. 5; *Danforth v. Tal-*

bot, 7 B. Mon. 623; *Ordway v. Dow*, 55 N. H. 11; *Ruffin v. Farmer*, 72 Ill. 615; *Schnure's Appeal*, 70 Pa. St. 400; *McCall's Appeal*, 88 Id. 254; *Kelso v. Kuming*, 1 Redf. 392; *Lowe v. Barnett*, 38 Miss. 329; *Blackburn v. Hawkins*, 6 Ark. 50.

Legacies, when Contingent. — The authorities are harmonious in support of the doctrine that the general policy of the law and the rules of interpretation both require that legacies should in all cases be held to the vested rather than contingent, unless clearly inconsistent with the intention of the testator: See *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198, and the cases cited above. So a slight circumstance may be sufficient to show that a legacy is vested, and not contingent: *Roberts v. Brinker*, 4 Dana, 570. Nevertheless, it is an established rule of construction respecting legacies, that when there is no other legatory expression or intention than that implied in a direction to pay or distribute at a future time or on a contingent event, the bequest, nothing else appearing, should be considered as contingent: *Roberts v. Brinker*, 4 Dana, 570; *Combs v. Branch*, 4 Id. 548; and see *Bowman's Appeal*, 34 Pa. St. 19; *McClure's Appeal*, 72 Id. 414; *Marr v. McCullough*, 6 Port. 507; *Travis v. Morrison*, 28 Ala. 494. The same rule has been otherwise expressed, that if the words to be "paid" or "payable" are omitted, and the legacies are given at twenty-one, or if, when, in case or provided the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend upon his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy: *Major v. Major*, 32 Gratt. 619, 823; and see *Guyther v. Taylor*, 3 Ired. Eq. 323; *Gifford v. Thorn*, 9 N. J. Eq. 72; *Watkins v. Quarles*, 23 Ark. 179. The rule is sometimes briefly stated, that where time is annexed to a legacy so as to make it essential to the gift, then it is contingent: *Underwood v. Dismukes*, Meigs, 299; and see *Moore v. Smith*, 9 Watts, 403; unless, however, other provisions of the will show a contrary intention, as by directing the application of the interest in the mean time to the use of the legatee, in which case the legacy vests immediately: *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588; *Willett v. Rutter*, 84 Ky. 317; and see *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198; *Loder v. Hatfield*, 71 N. Y. 92. And it is said that the rule forbidding the vesting of legacies does not control where the language of the will, while not expressly saying, "I give and bequeath," does yet plainly import a present gift intended to vest immediately, without reference to the clause of distribution: *Smith v. Edwards*, 88 Id. 92, 105. As a general rule, the testator is to be supposed as intending to vest the legacies at his death, and there should be plain indications of a different design, to take any particular case out of the rule: *Van Wyck v. Bloodgood*, 1 Bradf. 154; *Gaskell v. Harman*, 11 Ves. 498.

A provision contained in a will as follows: "When my land is sold, and the youngest child comes to full age, and each has received their share as above stated, and there is any yet remaining, it is my request that what remains shall be equally divided betwixt the surviving heirs," — was held to be a contingent legacy, payable when the testator's youngest child came of age, and to those residuary legatees only who survived at that period: *Lamb v. Lamb*, 8 Watts, 184. Huston, J., in the opinion, says: "The chancery books are full of very nice distinctions as to what words give a vested legacy, and the amount of the whole seems to be, that scarcely any form of expression can be used on which alone reliance can be placed. The whole will is to be taken into consideration, and the intention of the testator is to be gathered

from it, and if that can be discovered, every rule of construction is to give way to it": *Id.* 186. Such is also the doctrine of the principal case, and that of the authorities generally.

Under the following words in a will, "I give to A a horse, etc., when he shall arrive at the age of twenty-one years," the legacy is held to be contingent, being within the rule which annexes the time to the substance of the legacy, and its payment to the guardian of the legatee during his minority does not protect the executor: *Giles v. Franks*, 2 Dev. Eq. 521. So a testator provided in a clause of his will as follows: "If at my death there shall be any surplus stock or personal property, or any cash or cash notes on hands, it is my will and desire that the stock and personal property may be sold, the money collected, and loaned out during the life of my wife; and at her death, I desire that it may be divided between my said daughter and granddaughter." In construing this clause, it was held that the daughter and granddaughter did not take a vested interest, the other provisions of the will showing that by the provision in question the testator intended what its language alone imported: *Willett v. Rutter*, 84 Ky. 317. A bequest to W. J. T., "when he arrives at the age of twenty-one years, to him and his heirs forever," is a contingent legacy, and vests only on condition that the legatee lives to the age of twenty-one: *Gifford v. Thorn*, 9 N. J. Eq. 702; and to the same effect, see *Seibert's Appeal*, 13 Pa. St. 501; *Jackson v. Winne*, 7 Wend. 47; *Snow v. Snow*, 49 Me. 159; *Allen v. Whitaker*, 34 Ga. 6; *Collier v. Slaughter*, 20 Ala. 263; *Nixon v. Robbins*, 24 Id. 663; *Travis v. Morrison*, 28 Id. 494; *Moore v. Smith*, 9 Watts, 403. These cases illustrate the application of the general rule that where the legacy is given "if," "at," or "when" the legatee shall attain the age of twenty-one, or in language of like import, time is of the essence of the gift, and the legacy does not vest until the contingency happens: *Colt v. Hubbard*, 33 Conn. 281; *Watkins v. Quarles*, 23 Ark. 179; *Merry v. Hill*, L. R. 8 Eq. 619.

A testator, after directing the payment of his debts, made a disposition of the balance of his estate in these words: "Also, I direct that all the property I have, or in which I have an interest, both real and personal, be sold as is customary in such cases, and the net proceeds of the sale to be divided into four parts, namely, my brothers, J., W., and L., to have each a fourth part, and the other fourth part to be divided among my brother W.'s children, each one to have the amount of his share when he arrives at the age of twenty-one. The debts due me from my brother W. I give to him." The question to be determined was, whether the bequests to the children of W. vested in them at the death of the testator, or at the time they arrived at the age of twenty-one years; and it was held that according to the established rules of construction, as well as from the intention of the testator, plainly indicated by the terms of the will itself, the bequests did not vest at the death of the testator, but were contingent upon the fact that the legatees should arrive at the age of twenty-one, and therefore that the children dying before attaining that age took nothing under the will: *Major v. Major*, 32 Gratt. 819.

So a testator devised his estate to trustees, creating spendthrift trusts as to the income in favor of his children and grandchildren, and provided that "either at the death of the last survivor of my now living children or grandchildren who may be living at the time of my death, or at the expiration of twenty-one years from my own death, whichever event shall first happen," the principal of his estate should vest absolutely for distribution to those entitled to the income. In such case, neither of the events contemplated by

this clause of the will having yet happened, it was held that the interest of a child in the estate was therefore contingent, and not the subject of attachment: *Patterson v. Caldwell*, 124 Pa. St. 455; distinguishing *Reed's Appeal*, 118 Id 215; 4 Am. St. Rep. 588.

FOWLER v. BOWERY SAVINGS BANK.

[113 NEW YORK, 450.]

RELATION BETWEEN A SAVINGS BANK AND A DEPOSITOR THEREIN is that of debtor and creditor.

IF A BANK PAYS TO ONE PERSON MONEYS TO WHICH ANOTHER IS ENTITLED, the latter has two remedies: he may sue the bank as his debtor, disregarding the payment, or he may ratify the payment, and recover its amount from the person by whom it was received.

CONCLUSIVE ELECTION OF REMEDIES. — If a bank pays to one person moneys belonging to another, and the latter sues the wrongful receiver in an action for money had and received for the amount paid, he thereby irrevocably ratifies the payment and discharges the bank from all further obligation to him.

PLEADING. — Though a particular defense is not set up in the answer, yet if at the trial all facts pertaining to such defense were proved without objection or dispute, and are found by the court, objection cannot be made for the first time in the appellate court that the answer is defective in not setting out such defense.

ACTION against the defendant to recover moneys deposited with it in the manner set forth in the opinion. Judgment in favor of the plaintiff by the trial court was affirmed by the general term.

Carlisle Norwood, Jr., for the appellant.

Eugene Burlingame, for the respondent.

EARL, J. On the fifteenth day of November, 1871, John White, the husband of Elizabeth White, deposited with the defendant, in trust for his wife, the sum of \$805.93, and the deposit was entered upon a pass-book, which was delivered to him, in this way: "Bowery Savings Bank in account with John White for Elizabeth White." This deposit remained in the bank during the lifetime of John White, who died November 13, 1882, leaving a will, wherein he appointed John D. Flynn his executor. The will was admitted to probate and letters testamentary were granted to Flynn on the twenty-third day of January, 1883. Elizabeth White died December 18, 1882, leaving a last will and testament, in which the plaintiff was named as executor, which will was admitted to probate and letters testamentary were issued to the plaintiff on the eleventh day of Jan-

uary, 1883. On the twenty-fifth day of January, the plaintiff, with his letters testamentary, called at the savings bank and notified it of his appointment as executor, and demanded payment of the deposit. He was told by one of its officers that the money would be paid to him when he came with the pass-book, which was then in the possession of Flynn, the executor of John White. Thereafter, on the twenty-ninth day January, Flynn, having in his possession the pass-book, presented the same to the defendant, together with proof that he had been appointed executor of John White, and demanded payment of the deposit; and the defendant thereupon paid the same to him, and the pass-book was surrendered to it. Thereafter, on the same day, the plaintiff called on the defendant again in reference to the deposit, and was informed that it had been paid to Flynn. This action was commenced in June, 1886, to recover the sum deposited with the defendant, and interest thereon.

It is clear that the plaintiff was legally entitled to receive payment of the deposit from the defendant, and that after the notice and demand by him it had no right whatever to pay the same to Flynn; and but for facts yet to be stated, the cases of *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 Id. 209, would be ample authority for the maintenance of this action. After payment by the defendant to Flynn, the plaintiff, in the fall of 1883, commenced an action against him to recover, among other things, the money thus paid. Issue was joined, and the action was tried in the fall of 1884, and a verdict was rendered in favor of the plaintiff, and a judgment was thereon entered. The plaintiff was unable, however, to collect anything on the judgment, and he thereafter commenced this action.

The relation between a savings bank and a depositor therein is that of debtor and creditor, and the defendant, therefore, became a debtor for the sum deposited with it by John White: *People v. Mechanics' and Traders' Savings Institution*, 92 N. Y. 7. After his demand of the deposit, and the payment of the money to Flynn, there were two remedies open to the plaintiff: he could sue the defendant as a debtor for the deposit, and recover the amount thereof from it, or he could bring an action for money had and received to and for his use against Flynn, and recover it from him. But he was not entitled to both remedies at the same time, or in succession; and by electing the one he would lose the other. By electing to sue the bank

he would repudiate its payment to Flynn, and his claim would be that the debt had not, in fact, been paid. By suing Flynn he would adopt and ratify the act of the bank in making payment to him, and his claim would be that the money due to him had, in fact, been paid to Flynn, and that Flynn had received it to and for his use. Such adoption and ratification of the payment would legalize the payment as between him and the bank, and thus discharge the bank. He could not occupy the position at the same time of claiming that the bank had paid his money to Flynn, and yet that the bank was still his debtor. His election in this case to sue Flynn, and thus to treat him as his debtor, was not harmless to the bank, but in law may be presumed to have injured the bank, unless it should now be held to be discharged by its payment to Flynn. After the plaintiff commenced his action against Flynn, and thus ratified and adopted the payment by the bank to him, the bank could not, during the pendency of that action, have sued Flynn to recover back the money on the ground that it had been paid by mistake and received by him without authority, because it would have been a defense to such an action that the real owner of the fund had adopted and ratified the payment. But even if the mere commencement and pendency of the action by the plaintiff against Flynn would not have furnished such a defense, it is beyond doubt that if the bank should now bring an action against Flynn to recover back the money, he could successfully defend on the ground that the plaintiff had ratified and adopted the payment, and thus discharged the bank by the recovery of a judgment against him for the money paid as the real owner thereof.

The two remedies, one against Flynn and the other against the bank, are not concurrent. If the two actions could not be prosecuted at the same time, they could not in succession. Nothing could be more inconsistent than an action against Flynn on the ground that money due to the plaintiff had been paid to him, and an action against the bank on the ground that it had not paid the deposit, and still remained debtor therefor. If the money had been absolutely the money of the plaintiff, left on special deposit with the bank, then he could have pursued the money wherever he could trace it without losing his remedy against the bank. In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his remedies would be consistent, being

based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds wherever he can trace them, so far as the law will permit him to do so, without relieving the trustee. All his remedies in such a case are consistent and based upon the same theory, to wit, a breach of trust. But if a trustee is bound to pay money to a beneficiary as a debt due from him to the beneficiary, then if he makes payment to another person, he has not paid the debt, and the money paid is not, in fact, the property of the beneficiary. In such case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment, and sue the person receiving the money as his debtor, but he cannot do both. There is in such case a breach of trust, or not, as he may elect, and his election, once effectually made, is conclusive forever: Com. Dig., tit. Election, C, 2. If one wrongfully takes and sells personal property not belonging to him, the owner has the election to sue him for the proceeds as money had received to and for his use, and thus ratify the sale, or he may pursue the property and recover it or its value. But he cannot do both, and is bound by his election: Pomeroy on Remedies, secs. 567 et seq.

A few authorities may be cited to enforce these views. In *Priestly v. Fernie*, 3 Hurl. & C. 977, it was held that where the master of a ship signs a bill of lading in his own name, and is sued upon it, and judgment is obtained against him, an action will not lie against the owner of the ship upon the same bill of lading, although satisfaction has not been obtained on the judgment against the master. Baron Bramwell, writing the opinion, said: "If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made, the contractee has an election to sue the agent or principal, supposes he can only sue one of them; that is to say, sue to judgment."

In *Scarf v. Jardine*, L. R. 7 App. C. 345, the facts were these: A firm of two partners dissolved; one retired, and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm after the change, but without notice of

it. After receiving notice, he sued the new firm for the price of the goods, and upon their bankruptcy, proved against their estate, and afterwards brought an action for the price against the late partner, and it was held that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner or the members of the new firm, but could not sue all three together; and that, having elected to sue the new firm, he could not afterwards sue the late partner. In that case, Lord Blackburn said that the cases "are uniform in this respect; that where a man has an option to choose one or the other of two inconsistent things, when once he has made his election, it cannot be retracted; it is final, and cannot be altered. When once there has been an election to do one of two things, you cannot retract it, and do the other thing; the election once made is finally made." Lord Watson said: "The plaintiff had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that, having chosen to proceed against one of these firms for recovery of his debt, he could thereafter treat the other firm as his debtor."

In *Rawson v. Turner*, 4 Johns. 469, it was held that if a new sheriff receives a prisoner from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor; but the plaintiff has his election, either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff. If he has once made his election, and sued the old sheriff and recovered judgment against him, it is conclusive, and a bar to any action against the new sheriff.

In *Sanger v. Wood*, 3 Johns. Ch. 416, Chancellor Kent said: "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies." In *Morris v. Rexford*, 18 N. Y. 552, there was a bargain and sale of goods for cash, and the vendee took possession, but failing to make payment, the vendor obtained a redelivery of his goods by writ of replevin; and it was held that this was a disaffirmance of the sale, and evidence in bar of a subsequent action for the purchase-

money, and that the vendor having elected the one remedy, his right to pursue the other was extinguished. Comstock, J., writing the opinion, said: "A vendor of goods on a sale and delivery upon cash terms, if he fails to get payment, may consider the delivery absolute, and rely on the responsibility of the vendee, or he may disaffirm and reclaim his property. But he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone. The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the same person, founded on the sale and delivery of the same goods, for the recovery of the price. In peculiar circumstances, a party may take either one of these courses, but having rightfully made his choice, the right to follow the other is extinct and gone." So here, the law will not tolerate the absurdity of holding that the plaintiff could sue Flynn on the ground that he had received money from the bank belonging to him, and at the same time sue the bank on the ground that it still remained his debtor, and that the money paid to Flynn was not his money, and did not operate as payment.

In *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, it was held that the clerk of a broker, employed to sell land, having access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter, that if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land; and the vendor having brought suit against both the broker and his clerk, making a claim against the broker for having fraudulently sold the land, and against the clerk for a reconveyance or accounting, the court said: "In the present case, the plaintiff has elected to regard the purchaser as his trustee, and his complaint, as to him, proceeds on this basis. The plaintiff, therefore, elects to affirm the sale made to Smith. He cannot, *uno flatu*, affirm it as to him, and disaffirm it as to Ogden. . . . The affirmance of the sale by the plaintiff is a complete answer to the claim for damages against the firm for fraud in making the sale." In *Bank of Beloit v. Beale*, 34 N. Y. 473, it was held that when a vendor, who has been defrauded in the sale of his goods, proceeds to judgment against the vendee upon the contract of sale, after he is apprised of the fraud, his election is determined, and he cannot afterwards follow the goods or the proceeds thereof into

the hands of a third person on the ground of fraud; that if a principal, with a full knowledge of a fraud perpetrated by his agent in the disposition of property purchased with his funds, prosecute the agent to judgment for the money so misappropriated, he thereby elects to treat the goods as the property of the agent, and cannot afterwards claim their proceeds in the hands of a third party.

In *Rodermund v. Clark*, 46 N. Y. 354, W. and defendant were joint owners of a sloop. Defendant, ignoring W.'s rights, sold the whole vessel to M. W., after the sale, took and retained possession. M. thereupon libeled the vessel as owner in the United States district court. She was seized by the marshal, and M. having obtained judgment by default, she was delivered to him. W. assigned his interest, and also his claim against defendant, to the plaintiff, who sued for conversion; and it was held that W. having elected to assert his rights by retaining possession and refusing to recognize the sale, he and his assignee were precluded from maintaining an action for the conversion; that where a party has an election between inconsistent remedies he is confined to the remedy which he first chooses. Folger, J., writing the opinion, said: "W. had two courses, either of which he might pursue. He could sue the defendant for the conversion, or he could assert his right of possession by keeping a permanent possession, or regaining possession if it was interrupted. The effectually taking of either of these two courses precluded him from taking the other." In *Bowen v. Mandeville*, 95 N. Y. 237, it was held that where a party had been induced by fraud to enter into an executed contract for the purchase of property, he may either rescind and recover back the consideration paid, or affirm the contract and recover damages for the fraud; he cannot have both remedies, as they are inconsistent. In *Cheeseman v. Sturges*, 9 Bosw. 246, S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff and a third person, in specified proportions as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks or other securities than cash which should be received should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the

plaintiff, and received therefor stock of an incorporated company; and it was held that the plaintiff, by bringing an action, with full knowledge of these facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against any disposal of it pending the action, must be deemed to have made his election of that remedy, and be treated as if he had consented to the sale.

In *Mattlage v. Poole*, 15 Hun, 556, it was held, in substance, that where a vendor sells goods to the agent of an undisclosed principal, he may elect whether he will sue the agent for the price of the goods or the principal, but that he cannot have a recovery against both; and that where he has prosecuted the one to judgment, he can have no recovery against the other. In *Riley v. Albany Savings Bank*, 36 Id. 513, plaintiff's intestate, Mary Riley, had deposited with the defendant upwards of eight hundred dollars. The money was paid to Flannagan during the lifetime of Mary Riley, upon the production by him of the pass-book and Mary Riley's check. It was claimed that, at the time of signing the check, Mary Riley was of unsound mind, and incapable of executing the same. After Riley was appointed administrator, he presented a verified petition to the surrogate, under section 2706 of the Code of Civil Procedure, charging Flannagan with having corruptly procured an order from Mrs. Riley, knowing her to be insane, and having drawn the money from the bank, and further averring that he then had the same in his possession, and praying that he be compelled to surrender the same to the petitioner. Flannagan appeared on the return of a citation, and admitted that he obtained the money from the bank, and that the same was in his possession, and a decree was entered directing him to deliver the same to the administrator. For his failure to comply therewith, he was committed to the county jail, where he remained until discharged therefrom by the surrogate, because of his inability from sickness to bear longer the confinement; and it was held that the administrator, by claiming in his petition and procuring a decree of the surrogate's court adjudging that the money in Flannagan's hands belonged to the estate of Mary Riley, ratified the act of Flannagan in drawing the money, and could no longer claim that the bank still owed to him the same money, or bring an action against it to recover the amount of the deposit; that the administrator had an election to treat Flannagan's act in drawing the money in two ways, viz., either to

ratify or to disavow it; that having elected to ratify it, he could not thereafter disavow it. That case was appealed to this court, and the order of the general term reversing the judgment in favor of the plaintiff was here affirmed: 103 N. Y. 669. The following authorities are to the same effect: *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Clough v. London etc. R. R. Co.*, L. R. 7 Ex. 26; *Raymond v. Proprietors etc.*, 2 Met. 319; *Lewis v. Carrier*, 4 Allen, 339; *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51; *Moller v. Tuska*, 87 N. Y. 166.

This extended examination of the authorities has seemed necessary on account of some difference of opinion upon the question considered which at first existed among the members of this court. It is seen that they justify the conclusion that plaintiff's election to sue and his recovery against Flynn furnished a defense of this action.

It is, however, objected, on the part of the plaintiff, that the defense that plaintiff had adopted and ratified the payment to Flynn is not set up in the answer; and such is the case. While the defendant alleges in its answer payment to Flynn, it does not allege that payment was made by the authority of the plaintiff, or that he ratified or adopted it. But there was no such objection upon the trial. All the facts pertaining to that defense were proved without objection. There was no dispute about the facts, and they were found by the court. Hence the objection that the answer is defective is unavailing here.

We are therefore of opinion that the judgment should be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed.

PURSUIT OF ONE REMEDY WHEN AN IRREVOCABLE ELECTION NOT TO PURSUE ANOTHER. — The principle announced by the foregoing case as to the binding force of an election to pursue one of two inconsistent remedies has been applied under a variety of circumstances. Yet it is well to notice that remedies which might appear to be inconsistent are sometimes really concurrent. Thus there can be no doubt that a recovery in an action for the hire of personal property is no bar to another action seeking to obtain damages for injuries done to the property while in the hands of the bailee: *Shaw v. Beers*, 25 Ala. 449; and the fact that the holder of a note proved it in the court of bankruptcy as a claim against the estates of the makers, and received a dividend thereon, does not preclude him from proceeding against the makers in an action for deceit in the negotiation of the note: *McBean v. Fox*, 1 Ill. App. 177; so an action of tort can be maintained against a person, or his personal representative, for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment had been recovered against the firm, including himself, for the price of the goods

sold on credit to the firm by the plaintiffs in consequence of such misrepresentations: *Morgan v. Skidmore*, 55 Barb. 263; affirmed in court of appeals, in 3 Abb. N. C. 92; and similarly, where a member of a firm, by false representations, induced the plaintiff to purchase certain bonds from the firm, the firm giving the plaintiff an agreement to repurchase the bonds, the recovery by the plaintiff of a judgment against the firm for breach of such agreement is no defense to an action against the individual member for the fraud: *Goldberg v. Dougherty*, 7 Jones & S. 189; and also, where the plaintiff's testator was induced through fraud to purchase a bond and mortgage of the defendant, judgments recovered against the defendant for installments of interest falling due on the bond, in actions upon a guaranty of payment contained in the assignment of the securities, do not constitute a bar to an action to recover damages for the fraud: *Bowen v. Mandeville*, 95 N. Y. 237.

It will be observed that under the foregoing circumstances different judgments may be recovered, and satisfaction of all of them enforced. There are in reality different causes of action, each having its appropriate remedy. But another class of cases exists where there is but one cause of action, but in which different reliefs, which may be termed alternative, are recoverable. It is possible to pursue these reliefs independently, even to judgment, although but a single satisfaction can be had. Thus in *Connihan v. Thompson*, 111 Mass. 270, it was held that a purchaser of land, who had brought an action at law for breach of contract against the vendor, and attached the land as the property of the vendor standing in the name of a third person, to whom it had been conveyed with notice of the contract, was not thereby estopped to maintain a bill in equity for a specific performance against the vendor and such third person, although the latter had given a bond to dissolve the attachment. In this case, Wells, J., says: "It is contended that by commencing an action at law in which the land in question was specially attached, the plaintiff waived his remedy in equity. But the remedy in equity, by compelling specific performance, and that at law in damages for the breach, are both in affirmance of the contract. They are alternative remedies, but not inconsistent, and remedy in both forms might be sought in one and the same action. If the plaintiff institute separate actions, he cannot carry both to judgment and satisfaction. He may be compelled, by order of the court, at any stage of the proceedings, to elect which he will further prosecute. But the mere commencement or pendency of one will not bar the other or defeat the action. The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act, and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." Again, an action at law against an administrator to recover money embezzled from the plaintiffs by the decedent, in which judgment was obtained, pending which action a suit in equity was brought to recover the property purchased with the money, is held to evince no such distinct and deliberate choice to take the general claim against the estate for money, in lieu of the claim to the property, so as to bar the plaintiffs from prosecuting the suit in equity, especially where the judgment against the administrator merely establishes the claim against the estate: *Wells v. Rob-*

inson, 13 Cal. 133; so the filing of a claim for trust moneys by a ward in the probate court against the estate of a deceased guardian, which claim is withdrawn before any action is taken upon it, does not prevent the ward from proceeding in equity against the guardian's administrator to enforce a resulting trust in the ward's favor in respect to the land purchased by the guardian with the trust moneys: *Bitzer v. Bobo*, 39 Minn. 18; compare *Hanly v. Kelly*, 62 Cal. 155; *Cranston v. Smith*, 47 Mich. 647. In such cases as these, the plaintiff, as stated in the foregoing quotation, may be compelled to elect which action he will prosecute. Accordingly, where a creditor filed a bill to set aside or obtain relief against a judgment confessed by his debtor, on the ground of fraud, and obtained an injunction staying all proceedings on the judgment, and while the suit was pending he proceeded at law and recovered judgment against his debtor, and issued execution thereon, under which the property of the debtor was advertised for sale, the court refused to dismiss the bill on the petition of the defendants, but ordered the plaintiff to make his election either to stay his execution at law during the continuance of the injunction, or to consent to have the injunction dissolved, and the plaintiff refusing to make the election, the injunction was forthwith dissolved: *Livingston v. Kane*, 3 Johns. Ch. 224; and in *Rogers v. Vosburgh*, 4 Id. 84, it was likewise held that where the plaintiff has brought an action at law, and obtained a judgment, and at the same time filed his bill in equity against the defendant for the same matter, he would be put to an election either to proceed at law under the judgment or to proceed in equity; so if promissory notes have been procured by the defendant through fraud on an intestate, the administrator may maintain a bill in equity to compel their delivery to him, and to restrain their collection or transfer, but if he has also commenced an action at law to recover the value of the notes, he must elect which remedy he will pursue, and discontinue the other: *Lewis v. Carrier*, 4 Allen, 339.

Again, one may have a right of action against a number of different persons under such circumstances that proceeding against one without obtaining satisfaction will not bar an action against another. Thus the holder of negotiable paper does not forfeit his right of action against the other parties to the instrument by an unsuccessful suit against one: *Williams v. Jones*, 79 Ala. 119; *Railroad Co. v. National Bank*, 102 U. S. 14; nor does an unsuccessful attempt to obtain satisfaction from one wrong-doer furnish a reason why another should be exempted from responsibility: *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Huffman v. Hughlett*, 11 Lea, 549. Likewise, actions upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, although but one satisfaction can be obtained: *Corn Exchange Ins. Co. v. Babcock*, 8 Abb. Pr., N. S., 257; and see *Hawks v. Hinchliff*, 17 Barb. 492.

If, however, a party has remedies which are really inconsistent, he is put to an election between them; and an election once deliberately made by the institution of a suit in which the remedy is sought to be recovered is final: *Kinney v. Kiernan*, 49 N. Y. 164; *Moller v. Tuska*, 87 Id. 166; *Riley v. Albany Savings Bank*, 36 Hun, 513; affirmed in 103 N. Y. 669; *Thompson v. Howard*, 31 Mich. 309; and his failure to secure satisfaction by means of the remedy which he has adopted furnishes no legal reason for permitting him to resort to the other: *Goss v. Mather*, 2 Lans. 283; affirmed in 46 N. Y. 689; *Farwell v. Myers*, 59 Mich. 179; although if a party mistakes his remedy, he may sue again in proper form: *Butler v. Hildreth*, 5 Met. 49, 52; *Peters v. Ballister*, 3 Pick. 495; compare *Bulkley v. Morgan*, 46 Conn. 393, 394; *Nield v. Burton*, 49 Mich. 53. "A party who imagines he has two or more remedies, or who

misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one": *Bunch v. Grave*, 111 Ind. 351; and if the election is made in ignorance of his rights, he is not concluded: *Butler v. Hildreth*, 5 Met. 49, 51; *Dash v. Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291; *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25; *Hays v. Midas*, 104 Id. 602; *Conrow v. Little*, 41 Hun, 25; *Bach v. Tuck*, 47 Id. 536. In accordance with these principles, if one is entitled to rescind a contract on the ground of fraud, or for some other reason, he loses the right if, after knowledge thereof, he brings an action to enforce the contract: *Acer v. Hotchkiss*, 97 N. Y. 395; *Nelson v. Carrington*, 4 Munf. 332; 6 Am. Dec. 519; *Pettus v. Smith*, 4 Rich. Eq. 197; or if, after bringing the action to enforce the contract, he discovers the cause for rescission, but nevertheless proceeds with such action: *Sanger v. Wood*, 3 Johns. Ch. 416. Therefore, if a sale of personal property is induced through a fraud upon the vendor, the vendor cannot claim the property on account of the fraud, if, after being apprised thereof, he institutes an action against the vendee for the price: *Lloyd v. Brewster*, 4 Paige, 537; 27 Am. Dec. 88; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Bulkeley v. Morgan*, 46 Conn. 393, 394; *O'Donald v. Constant*, 82 Ind. 212; *Dibblee v. Sheldon*, 10 Blatchf. 178; and where a vendor from whom goods have been obtained by fraud brings an action against the vendee on the contract for the price, and recovers judgment, neither the vendor nor a receiver appointed in supplementary proceedings on such judgment can set up the fraud for the purpose of defeating an assignment of the property by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee: *Kennedy v. Thorp*, 51 N. Y. 174; so if a bankrupt, on the eve of bankruptcy, fraudulently delivers goods to one of his creditors, the assignees, by bringing *assumpsit*, affirm the transaction, and the creditor may set off his debt: *Smith v. Hodson*, 4 Term Rep. 211; 2 Smith's Lead. Cas. *126; and if the assignee of an insolvent debtor, knowing all the facts of the case, brings an action against the vendee on a note given for the price of goods sold by the insolvent to the vendee, and secures the demand by attachment, he thereby affirms the sale, and cannot, by discontinuing such action and demanding the goods, maintain trover on the ground that they were sold by the insolvent for the purpose of delaying and defrauding his creditors: *Butler v. Hildreth*, 5 Met. 49.

On the other hand, if the defrauded vendor obtains a redelivery of the goods in replevin, he cannot bring a subsequent action for the purchase price: *Morris v. Rexford*, 18 N. Y. 552. So a creditor who has proved a claim against an estate in bankruptcy, as for goods sold and delivered to the bankrupt, cannot maintain an action of replevin for the goods by proof that he did not sell them to the bankrupt: *Ormsby v. Dearborn*, 116 Mass. 386; an action by a vendor for the price of goods sold is an affirmance of the sale, and precludes him from denying it: *Beurmann v. Van Buren*, 44 Mich. 496. If the vendor should fail to obtain satisfaction through the remedy he has elected to adopt, that fact will give him no right to resort to the other and inconsistent remedy. Consequently, where the vendors brought suit in replevin against the vendee's assignee for the benefit of creditors to recover the goods sold, on the ground of the vendee's fraud in the purchase, and recovered judgment, they cannot afterwards, because of their failure to obtain full satisfaction of the judgment, file in court a claim against the assignor, based on the theory that the goods were sold to the assignor: *Farwell v. Myers*, 59 Mich. 179; and where a defrauded vendor sues in replevin, he cannot, during the pendency of such action, sue on contract to recover the value

of the portion which was not replevied: *Will v. Brownstein*, 35 Hun, 68; but it is otherwise held that such vendor is not precluded from maintaining an action of replevin for a portion of the goods retained by the vendee by the fact that he had issued an attachment for the price of the remainder of the goods which the vendee had resold, and which could not be reached in replevin: *Browning v. Bancroft*, 8 Met. 278; and a vendor who brought replevin for a part of the goods in the possession of a third person, who was alleged to have taken them of the buyer with knowledge of the fraud, was held not to have affirmed the sale from the fact that he had previously instituted an action of *assumpsit* against the buyer to recover the price of a portion of the goods which the buyer had sold: *Morford v. Peck*, 46 Conn. 380; so it is held the defrauded vendor does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion: *Powers v. Benedict*, 88 N. Y. 605; *Hersey v. Benedict*, 15 Hun, 282. Since an election once deliberately determined is final, if the defrauded vendor institutes an action for the conversion of the goods against purchasers from the vendee, such action cannot be affected by his commencing another action against the vendee for goods sold and delivered: *Kinney v. Kiernan*, 49 N. Y. 164; nor is it any defense to an action by defrauded vendors to recover possession of the goods that they subsequently, and during its pendency, proved a claim in bankruptcy against the vendees as for goods sold, and received from the assignee a dividend thereon; the claim, however, being afterwards expunged from the record and the dividend paid back to the assignee: *Moller v. Tuska*, 87 N. Y. 166. But the election, to be binding upon the vendor, must be knowingly made. And therefore the commencement by him of an action to recover the purchase price of the goods sold, even though he caused an attachment to be issued, does not preclude him from rescinding the sale on the ground of fraud, in the absence of proof that he brought the first action with knowledge of the fraud: *Equitable Co-operative Foundry Co. v. Hersee*, 103 Id. 25; *Hayes v. Midas*, 104 Id. 602; *Conrow v. Little*, 41 Hun, 395; *Back v. Tuch*, 47 Id. 536. It is also held that the taking out of an attachment by a vendor, without commencing an action for the purchase price, the attachment being thereby void, cannot be treated as an election on his part to affirm the contract of sale, and prevent him from rescinding it on the ground of fraud and suing to recover possession of the goods: *Johnson v. Frew*, 33 Hun, 193.

If a tort is committed under such circumstances that the law allows the injured party either to sue in tort or to waive the tort and sue in contract, plainly it gives him the choice between inconsistent remedies; and his election to proceed in one mode or the other, when determined according to the foregoing general rules, is binding. Thus if one's property has been converted by another, a judgment in trover or trespass against the wrong-doer is a bar to a subsequent action of *assumpsit* against him for the value of the property: *Agnew v. McElroy*, 10 Smedes & M. 552; 48 Am. Dec. 772; *Floyd v. Browne*, 1 Rawle, 121; and the effect is the same if the judgment be for the defendant: *Kitchen v. Campbell*, 3 Wils. 304; *Rice v. King*, 7 Johns. 20; and on the other hand, judgment in *assumpsit*, as for goods sold and delivered, against the party who has converted them, is a bar to an action for the conversion: *Walsh v. Chesapeake etc. Canal Co.*, 59 Md. 423; *Fields v. Bland*, 81 N. Y. 239. It is even held that where the owner of property converted waives the tort and sues in *assumpsit* for its value, he is thereby precluded from bringing trover against the defendant's vendees, although the first action had failed because brought in a court which did not have jurisdiction:

Nield v. Burton, 49 Mich. 53. Similarly, a father is precluded from bringing an action in case for the unlawful enticing away and harboring his minor son, after he has brought *assumpsit* for the son's wages during the same period on the basis of an implied contract, although he discontinues such latter action after disagreement of the jury: *Thompson v. Howard*, 31 Mich. 309, the court saying: "A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

Again, where the defendant, who held certain property for the joint benefit of himself, the plaintiff, and a third person, subsequently sold and conveyed the property without the plaintiff's consent, receiving therefor stock in a corporation, it was held that the plaintiff by bringing an action with full knowledge of the facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against its disposal pending the action, must be deemed thereby to have made his election of the remedy, and must be treated as if he had consented to the sale: *Cheeseman v. Sturges*, 9 Bosw. 246; and likewise, where one of two tenants in common of a sloop sells the whole vessel to a third person, the co-tenant may either sue such third person for a conversion, or may assert his right to the possession by keeping it or regaining it if it is interrupted; but if he asserts his right to the possession, he cannot sue for conversion: *Rodermund v. Clark*, 46 N. Y. 354; also, where a corporation brings *assumpsit* against its secretary for the amount of bills and notes transferred by him without authority, and summons the transferee by process of garnishment, and takes judgment against him for the balance of indebtedness admitted by his answer on account of the bills and notes, and coerces satisfaction of the judgment, this is a confirmation of the transaction, and will estop the company from afterwards bringing trover against the transferee: *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228. So one who with knowledge of the facts brings an action against commissioners of highways for the contract price of a bridge, and prosecutes the same to judgment, failing in recovery because the cause of action is barred by the statute of limitations, must be deemed to have made his election of remedies, so that he will be prevented from maintaining an action for the conversion by the commissioners of the materials used in constructing the bridge: *Boots v. Ferguson*, 46 Hun, 129.

If also a sale of personal property is made on condition that the title should remain in the vendor until the whole purchase price, payable in installments, is paid, the commencement by the vendor of an action to recover the balance due and unpaid is an election to treat the sale as absolute, and is a waiver of his right to reclaim the goods: *Wright v. Pierce*, 4 Hun, 351; 6 Thomp. & C. 651; and see *Bailey v. Hervey*, 135 Mass. 172. A person whose property has been sold to pay an assessment which is illegal for want of jurisdiction in the assessors may recover damages to the extent of his injury in an action of tort against the assessors, or he may recover the proceeds of the sale in *assumpsit* against the town; but if he elects to bring the action in *assumpsit*, and recovers judgment, which is satisfied, he thereby waives the tort, and cannot maintain an action against the assessors: *Ware v. Percival*, 61 Me. 391; 14 Am. Rep. 565; and where a vendor falsely warrants a horse sold to be sound, the vendee has an election to sue in tort for the false representations, or in contract for the breach of warranty; but having elected to sue in

tort and to recover judgment, he cannot afterwards sue in contract: *Norton v. Dokerty*, 3 Gray, 372; 63 Am. Dec. 758; so where an attorney contracts to discharge a judgment and execution against the plaintiff, and fails to do so, but causes the plaintiff's arrest under the execution, the plaintiff has an election to sue either in contract or in tort; but having sued in contract and recovered judgment, he cannot sue again in tort: *Smith v. Way*, 9 Allen, 472, 473. Where a statute authorizes actions for labor debts to be brought against a corporation alone, or jointly with one or more of the stockholders, a claimant who has elected to sue the corporation alone, and has recovered judgment, it is held cannot afterwards maintain an action on the same debt or claim against the corporation and the stockholders jointly: *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231.

The bringing of an action against a sheriff for an alleged voluntary escape of a defendant in execution is an election on the part of the plaintiff to consider such defendant out of custody, and therefore no action can be maintained by the plaintiff for a subsequent escape of the same defendant from the custody of the sheriff: *Littlefield v. Brown*, 1 Wend. 398; 7 Id. 454; affirmed in 11 Id. 467; and if a sheriff receives a prisoner for debt from his predecessor, he is answerable for the prisoner's escape, though a voluntary escape may have existed in the time of his predecessor; and the plaintiff has his election, either to consider the prisoner in execution, and so charge the new sheriff for the last escape, or as out of execution, and charge the old sheriff; but if he has once made his election, and sued the old sheriff, and recovered judgment against him, it is a bar to any action against the new sheriff: *Rawson v. Turner*, 4 Johns. 469; but where, after a voluntary escape of a prisoner on execution, and return into custody, the sheriff went out of office, and assigned the prisoner to his successor, and while in the latter's custody, the prisoner applied to the court for his discharge, and the plaintiff, not knowing of the escape, opposed the application, in consequence of which the prisoner remained in custody, it was held that this was not such an election to affirm the debtor in custody as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape: *Dash v. Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291; and see *McElroy v. Mancius*, 13 Johns. 121; for the reason that "a party can never be said to have made an election between two remedies where he was totally ignorant of one of them." If, as above shown, a party has two remedies which are not inconsistent, he may pursue them both, although he can have but one satisfaction; and therefore the plaintiff may proceed against a sheriff for an escape of a defendant in execution, and at the same time take out a *fiery facias* against the defendant's property: *Jackson v. Bartlett*, 8 Johns. 361.

The bringing of an action of ejectment by a landlord for the demised premises, because of a forfeiture, operates as a final election by him to determine the term, and he cannot afterwards sue for rent due or covenants broken subsequent to the bringing of the action: *Jones v. Carter*, 15 Mees. & W. 718; nor can a landlord who elects to proceed at law against his tenant to enforce a forfeiture have relief in equity against the tenant during the pendency of such action as upon a subsisting tenancy: *Stuyvesant v. Davis*, 9 Paige, 427; and, on the other hand, a lessor's right to enforce the forfeiture is waived when he, with knowledge thereof, accepts rent, or brings an action for rent, accruing subsequently to the cause of forfeiture: *Dendy v. Nicholl*, 4 Com. B., N. S., 376; *McKildoe v. Darracott*, 13 Gratt. 278. In such cases as these, it is evident that the remedies are inconsistent, and that the election once deliberately determined is final. But under somewhat similar cir-

circumstances the remedies may be concurrent; and therefore an action of ejectment brought by a lessor against an assignee of the lessee to recover possession of the demised premises, after the expiration of the term, does not prevent the lessor from maintaining a subsequent action against the assignor to recover damages for the breach of a covenant in the lease to surrender the possession at the expiration of the term: *Coburn v. Goodall*, 72 Cal. 498.

If an agent enters into a contract on behalf of an undisclosed principal, or under such other circumstances that the third person may sue either the agent or the principal, it has been held that the mere commencement of an action against the agent will not discharge the principal: *Raymond v. Proprietors of Crown and Eagle Mills*, 2 Met. 319; *Ferry v. Moore*, 18 Ill. App. 135; *Curtis v. Williamson*, L. R. 10 Q. B. 57; and, on the other hand, the commencement of an action against the principal, when disclosed, is not conclusive of an election to hold him responsible, so as to bar an action against the agent: *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51; *Nason v. Cockroft*, 3 Duer, 366, 369; and that the mere act of the third person, in suing both the agent and the undisclosed principal, does not constitute an election to hold the principal and discharge the agent, so that the action may be dismissed as to the latter: *Mattlage v. Poole*, 15 Hun, 556; compare *Fitzsimmons v. Baxter*, 3 Daly, 81; *Borell v. Newell*, 3 Id. 233. It has even been held that the recovery of a judgment against the agent was no bar to a subsequent action against the principal, without satisfaction of the judgment: *Beymer v. Bonsall*, 79 Pa. St. 298; *contra*, *Priestly v. Fernie*, 3 Hurl. & C. 977; and there would be more reason for such a ruling if the agent had committed a tort within the scope of his agency: See *Maple v. Railroad Co.*, 40 Ohio St. 313; 48 Am. Rep. 685. In regard to this latter line of authorities, it may be observed that while the mere institution of an action should plainly not conclusively determine one's election, in the case of principal or agent, or any other case, yet if the action be commenced, with full knowledge of one's rights, against the agent, it should be a bar to a subsequent action against the principal, and *vice versa*; for by suing the agent, the third person disaffirms the agency, while by suing the principal, he affirms the fact that the other was acting simply as agent.

BANKS AND DEPOSITORS. — When one deposits money in a bank, the relation of debtor and creditor is thereby created between the bank and the depositor: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202; *Gumbel v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426; *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249, and note; *Lynch v. First National Bank*, 107 N. Y. 579; 1 Am. St. Rep. 803; with an implied promise on the part of the bank to pay out on checks drawn by the depositor: *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146, and note 157.

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ALLOWANCE WILL BE MADE TO FRAUDULENT GRANTEE IN A SUIT IN EQUITY to compel him to account for rents received before the conveyance to him was set aside, for moneys paid out by him for taxes, necessary repairs, interest on valid pre-existing liens, and, in some cases, for commissions paid by him for the collection of rents; but he is not entitled to any allowance for insurance effected in his name and for his benefit. If he has paid interest at the rate of seven per cent on mortgages long past due, on which only six per cent could have been demanded by the mortgagees, he is not entitled to credit for any more than the latter sum.

THE RULES GOVERNING AN ACTION AGAINST A FRAUDULENT GRANTEE are different from those applicable to an action brought by him. In an action of the latter class, the court might leave him entangled in the toil which he had himself woven, the victim of his own fraudulent acts. But when he is a defendant, pursued for the purpose of an accounting, such accounting will be controlled by equitable principles, and he may be allowed as offsets expenditures necessarily made by him for the preservation of the property, or for the discharge of pre-existing liens thereon.

ACTION to set aside a conveyance made to the defendant, John Wilkinson, with intent to defraud the creditors of the grantors. A judgment was entered setting aside the conveyance as prayed for, and after this judgment had been finally affirmed, a referee was appointed to take an account of the rents collected by the defendant. He took such account, and allowed the defendant sums paid for repairs, for taxes, for interest paid on mortgages at the rate of six per cent, for amounts paid by him for insurance, but disallowed him an amount claimed to have been expended for commissions for the collection of rents. When the report of the referee came up for consideration at the special term, it was confirmed, except that the credit for commissions paid for collecting rents was reduced from \$2,123.31 to \$900. Both parties appealed to the general term, which disallowed all credits allowed to the defendant, and charged him with the gross amounts of the rents received.

Louis Marshall, for the appellant.

Frank Hiscock, for the respondents.

EARL, J. Upon the trial of this action it was adjudged that the deed from J. Forman and Alfred Wilkinson to John Wilkinson was executed and delivered by them, and received by him, with intent on the part of each of them to hinder, delay, cheat, and defraud the plaintiffs, and other creditors of the grantors, and that it was therefore fraudulent and void, and

should be set aside. It was held at the general term, by the decision now under review, that because the grantee, John Wilkinson, was an active and guilty participant in the fraud, he was entitled to no deduction from the gross amount of rents received by him on account of money paid by him either for taxes, interest, repairs, insurance, or the expenses of collecting the rents. This conclusion was reached by the applition of the general rule that a fraudulent grantee thus situated is entitled to no protection, aid, or assistance from a court of equity. A general statement of the rule is found in *Sands v. Codwise*, 4 Johns. 537, 4 Am. Dec. 305, in the language of Chief Justice Kent, as follows: "A fraudulent conveyance is no conveyance as against the interest intended to be defrauded. This is the plain language and intelligent sense of the rule of the common law. It is impossible that these deeds can be permitted to stand as a security if they are to be adjudged void *ab initio*. If they have no lawful existence, it would be inconsistent and absurd to recognize them for any lawful purpose. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis* in a case of positive fraud. In *Smith v. Loader*, Prec. Ch. 80, the party advancing money to an agent, under a combination with him to cheat the principal, lost his whole security from the principal for the money actually advanced to his agent. It is fit and proper that this result should take place, as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat." In *Boyd v. Dunlap*, 1 Johns. Ch. 479, the same learned jurist said: "A deed fraudulent in fact is absolutely void, and is not permitted to stand as security for any purprse of reimbursement or indemnity." In *Lobstein v. Lehn*, 120 Ill. 549, it was held that a deed fraudulent in fact is absolutely void as against creditors of the grantor, and will not be permitted to stand as a security for any purpose of reimbursement or indemnity, but that it is otherwise with a deed which is only constructively fraudulent; that in the latter case the grantee may hold the same as a security for a debt honestly due him.

The following cases are particularly relied upon to sustain the conclusion of the general term: *Bean v. Smith*, 2 Mason, 252; *Railroad Co. v. Soutter*, 13 Wall. 517; *Borland v. Walker*, 7 Ala. 269; *Thompson v. Bickford*, 19 Minn. 17; *Allen v. Berry*,

50 Mo. 90; *Seivers v. Dickover*, 101 Ind. 495; *Stovall v. Farmers' and Merchants' Bank*, 16 Miss. 305; 47 Am. Dec. 85; *Kenney v. Brown*, 3 Ridg. P. C. 462; *Backhouse's Adm'r v. Jett*, 1 Brock. 500; *Blow v. Maynard*, *Lawrence v. Blow*, 2 Leigh, 29; *Pettus v. Smith*, 4 Rich. Eq. 197; *Mosely v. Miller*, 13 Bush, 408; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *King v. Wilcox*, 11 Paige, 589; *Lore v. Dierkes*, 16 Abb. N. C. 47; *Union National Bank v. Warner*, 12 Hun, 306; *Wood v. Hunt*, 38 Barb. 302; *Davis v. Leopold*, 87 N. Y. 620.

We have carefully examined these authorities, and they furnish very little, if any, countenance for the contention of the plaintiffs. They are all cases where the fraudulent grantee was asking for the active interference of some court for his protection, or for his reimbursement for improvements, for moneys paid in pursuance of the fraudulent arrangement with his grantor, or to discharge encumbrances, or to secure to him the payment of a debt due to him from the fraudulent grantor, or where he was compelled to account for profits which he had actually made, or could have made, out of the property fraudulently conveyed; and the equitable rule was enforced that "he who hath committed iniquity shall not have equity," which is merely another way for saying "that one who comes into a court of equity, seeking its aid, must come with clean hands." But in none of them was the question really involved or discussed with which we are now dealing, with the possible exception of three cases, to which we now call attention.

In *Wood v. Hunt*, *supra*, evidence was given that the fraudulent grantee of land, subsequently to the grant, paid certain debts of the grantor, and purchased certain obligations against him; and it was held that the grantee, by such evidence alone, did not present a case which entitled him to demand, as a condition to the granting of relief to the creditors of the grantor by adjudging the grant void, and directing a sale of the premises, and the satisfaction of a judgment creditor from the proceeds of the sale, that any provision should be made for his indemnity for sums which he had thus voluntarily paid. The complicity of the grantee in the fraud of the grantor deprived him of any right to relief, in respect to such payments, from a court of equity. In that case, the fraudulent grantee was seeking the protection of the court for payments to creditors of the grantor, and to the grantor himself. It is true that, in a certain contingency, he

was ordered to account for rents and profits. But there was no adjudication as to the principles upon which such an accounting should be had, and no holding that, upon such an accounting, a fraudulent grantee should be bound to account for the gross rents and profits received, without any allowance for taxes or repairs.

In *Thompson v. Bickford*, *supra*, the court said: "In equity a conveyance set aside as constructively fraudulent is upheld in favor of one not guilty of actual fraud to the extent of the actual consideration, and is vacated only as to the excess. But if there be actual fraud, there is no difference between law and equity. The conveyance is considered as void *ab initio*, and set aside entirely, and cannot stand as security to the fraudulent grantee. It is the same thing as if no deed had ever been executed." In the head-note it is stated that the rents and profits and the proceeds of the parcel of land sold were liable to the same extent as the land, and that the grantee was accountable for them to the grantor's creditors, without deduction for his demands, or for the money paid for taxes, or to extinguish liens or encumbrances placed thereon by the grantor. The facts as to the payment of the taxes do not appear. There is no discussion as to them in the opinion, and it does not appear clearly from the opinion that the court held that the fraudulent grantee could not have a deduction from the rents on account of taxes paid by him. So far as it was held that the fraudulent grantee could not claim reimbursement for the liens or encumbrances paid, or that he could not have satisfaction of the indebtedness from the fraudulent grantor to him, it was simply an enforcement of the general rule in harmony with all the other cases. The main contention there was as to the indebtedness of the fraudulent grantor to the fraudulent grantee; and it does not appear that the fraudulent grantee was required to account for the gross rents.

In *Allen v. Berry*, *supra*, it was held that where a creditor purchases the lands of his debtor at a sale under execution, and brings suit against the debtor and a third party to set aside as fraudulent a conveyance of the land from the former to the latter, no principle of equity will permit the fraudulent grantee to offset against the value of the property the amount he may have paid for it; that fraud renders the deed absolutely void as to creditors, and the plaintiff is entitled to recover the property and its rents, etc., as though no such fraudulent deed

ever had been made. In that case Jones, the fraudulent grantee, put improvements upon the house fraudulently conveyed to him to the amount of about twelve hundred dollars, and he occupied it himself, and it was proven that the rents and profits were worth one hundred dollars per annum, and he was ordered to pay the plaintiff four hundred dollars for four years' rent. It does not appear that the improvements made upon the house were necessary for its preservation, or to make it suitable for occupation. The costs of the improvements were not actually disallowed. The property was sold under a mortgage foreclosure, and there was a surplus of seventeen hundred dollars which came into the hands of Jones, and this statement is contained in the opinion: "The decree does not refer to the improvements by Jones on the Hamilton house, nor does it charge him with the overplus money he received at the sale under the county mortgage, which, with other moneys collected by him, was more than the amount of the alleged improvements." It therefore appears in that case that the fraudulent grantee was allowed to retain more money than the amount of the improvements made by him upon the house. These cases, therefore, have little or no bearing upon the present discussion.

The only authority we have been able to find squarely upholding the plaintiff's contention is *Strike's Case*, 1 Bland, 57. In that case Strike was the fraudulent grantee of property subject to a ground-rent, and he was compelled to account for the full value of the rents and profits of the property, rejecting entirely his claim for his advances in payment of taxes, ground-rent, and an assessment for a street extension. While the rule as to the responsibility of fraudulent grantees was there very accurately stated and properly applied by the chancellor of Maryland, so far, however, as it was decided that the fraudulent grantee should be made to account for rents and profits without any allowance for taxes, assessments, and ground-rents paid by him, it is, we believe, unsupported by any authority, and stands without a fellow in this country or in England.

There is not a hint in any authority in this state sustaining the contention of the plaintiffs. But here and elsewhere there are some authorities which sustain the claim of the appellant as to some of the items at least which were disallowed at the general term. In *Bump on Fraudulent Conveyances*, 575, it is said: "When the transfer is tainted with actual fraud, no

allowance can be made for improvements. It would seem, however, to be just and reasonable to allow expenditures as an offset to rents and profits, especially when they have been made to pay taxes." In *Jackson v. Ludeling*, 99 U. S. 513, the case arose under the civil law as administered in Louisiana, and cannot, therefore, be an authority in this case. But Mr. Justice Bradley, delivering the opinion in that case, said: "But as the vice of their title consisted in their own inequitable acts and proceedings, we think that they are to be regarded, in the language of the civil law, as possessors in bad faith. The common law allows nothing to the possessor in good or bad faith for expenditures made upon land from which he is evicted by superior title; but equity, in cases within its jurisdiction, allows the possessor in good faith for repairs and improvements, but where the possessor (being a trustee) has been guilty of actual fraud, it makes him no allowance for improvements, but allows him compensation for necessary repairs." In *Sands v. Codwise*, *supra*, while the general rule as to the situation and responsibilities of fraudulent grantees is accurately and fully stated by Chief Justice Kent, and the fraudulent grantees there were ordered to account for the rents and profits of the lands conveyed to them, it was ordered (p. 605) that, in taking such accounts, allowances should be made for taxes, repairs, and improvements permanently useful, and that only the balance of the rents and profits should be paid to the assignee of the estate of the fraudulent grantor; and that case seems to be a precise authority for the allowance in this case of the sums paid by John Wilkinson for taxes and repairs. In *Van Horne v. Fonda*, *supra*, the defendant was held to be a fraudulent purchaser of what was called the Caughnawaga farm, and it was decreed that he should convey the same to the plaintiffs free from all encumbrances. The learned counsel for the plaintiffs, Mr. Henry, admitted that while the defendant should be charged with the rents and profits of the farm he should be credited with actual expenditures for repairs. Chancellor Kent held that the defendant ought to be charged with the rents and profits, and credited "with expenditures for actual repairs." He said further: "Nor do I think that the defendant ought to be allowed, under the circumstances of this case, for what might otherwise be deemed beneficial improvements made by him on the Caughnawaga farm. He entered in his own wrong, and held under a claim of title procured by fraud, and

he is not entitled beyond the amount of his actual expenditures. Everything beyond that was gratuitous. A fraudulent possessor is never allowed for beneficial improvements."

In *King v. Wilcox*, 11 Paige, 589, the owner of a lot, with a house thereon, which was subject to two mortgages, conveyed it absolutely to his brother-in-law for the purpose of defrauding his creditors, and the grantee subsequently went into possession and received the rents and profits, and made some improvements thereon, and subsequently paid and took an assignment of the mortgages, and it was held that a subsequent creditor of the fraudulent grantor had a right to file a bill to set aside the fraudulent conveyance, and to have the proceeds of the property applied to the payment of his debt, after paying the amount due upon the mortgages, and the value of the improvements made by the fraudulent grantee upon the premises. It was also held that in taking an account of the rents and profits of the premises received by the fraudulent grantee, to be offset against the amount due to him upon the mortgages, he should not be charged with that part of the rents and profits which had arisen exclusively from his own improvements. The chancellor said: "So far as respects the mortgages held by the fraudulent grantee, the rents and profits are unquestionably an equitable offset, after deducting for taxes and assessments, except such part of the rents and profits as have arisen exclusively from improvements made by Sawyer, the fraudulent grantee." It is true that there the fraudulent grantee, after he had taken an assignment of the mortgages, was in some sense a mortgagee in possession. Yet he had taken the conveyance and gone into possession for the purpose of defrauding the creditors of the grantor, and it is not perceived how, while he was thus in possession, he could better his condition by taking an assignment of valid mortgages for the purpose of still further effectually carrying out the fraudulent scheme. He was still a fraudulent grantee in possession, and bound to account for the rents and profits upon the same principles which would be applicable to any other fraudulent grantee; and yet it was held that he was entitled to deductions on account of taxes, assessments, and improvements.

A further reference to the authorities is not needful. We think the weight of authority is where we might expect to find it, in favor of the allowance of at least some of the claims of John Wilkinson, which were disallowed at the general term.

It is the general rule, even in actions to recover damages for pure torts, that the plaintiff shall recover compensation for such damages only as he has actually suffered; and such is the invariable rule in all cases except where, by the settled rules of laws, punitive damages may be awarded; and in such cases courts are constantly striving to come nearer to the rule of compensation, leaving the wrong-doer to the criminal courts for punishment. In actions of ejectment, even against persons occupying land without a shadow of right, the plaintiff can recover as mesne profits only the rental value, as in an action for use and occupation; and such value is not based upon gross rents, but upon net rents, after allowance for necessary repairs, taxes, and other fixed charges: *Murray v. Gouverneur*, 2 Johns. Cas. 438; 1 Am. Dec. 177; *Holmes v. Davis*, 19 N. Y. 488. The wrongful infringer of a patent is not required to pay to the patentee the gross profits he has made, but only the net profits: *Tremolo Patent*, 23 Wall. 518; *Burdell v. Denig*, 92 U. S. 716.

It is true that a fraudulent grant to a grantee who is a guilty participant in the fraud must, as to the creditors of the grantor, be treated as void *ab initio*. But the only way the creditors can reach the rents and profits received by the grantee is by an accounting in equity. And what does such an accounting mean? Does it mean that he shall pay for more rent than he has received or could have received? for more profits than he has made or could have made? Shall he account to the creditors for more rents than they could have received if they had had possession of the real estate? If the grant be of a waste piece of land which the grantee has improved so as to make rent possible, shall he account for gross rents without any allowance for his improvements? If the fraudulent conveyance be of a vessel, unseaworthy, and the vendee makes her, by repairs, seaworthy, and then charters her, shall he be required to account for the gross charter money? or, in the cases above cited, where the fraudulent vendee of slaves was compelled to account for their hire, would an allowance for their maintenance while they were working for hire have been denied? To answer these queries in the affirmative would, even in a court of equity, be a wide departure from the rule of compensation. It would be spoliation, not justice or equity. A court of equity does not sit for the punishment of criminals. If a fraudulent grantee has violated the criminal law, he may be prosecuted and punished

in the criminal courts. While such a grantee will not be allowed for permanent improvements made upon the granted property to suit his fancy, or simply to promote his supposed interests, when the creditors of the grantor come into a court of equity seeking to compel him to account for rents and profits, the accounting must be upon equitable principles; and when he has been compelled to surrender the property conveyed to him, and to account for all the profits he has made or could have made or ought to have made therefrom, the ends of justice have been completely and exactly attained.

Now, looking first at the taxes paid by John Wilkinson, they were imposed by supreme authority for the benefit of the public, and were inevitable. If the creditors had taken the property at the time John Wilkinson took it, they would have been obliged to pay them. By the payment he did them no wrong and caused them no prejudice. Why should he not be allowed them? Upon what principle of equity, or upon what ground of reason or public policy or justice, can he be compelled to allow for the gross rents without any deduction whatever for the taxes which he was obliged to pay?

In reference to the repairs, it was found that "they were necessary for the preservation of the property and to keep the same tenantable." The expenses for them were not made in pursuance of or to carry out the fraudulent scheme or to gratify the caprice of John Wilkinson; but they were necessary to preserve this very property for the creditors, and to make the rents for which he is accountable. Why, then, should he not be allowed for such expenses? No harm or prejudice is caused the creditors by such allowance. The repairs, as it turned out, were really made for their benefit.

As to the interest upon the mortgages, there was no dispute that the mortgages were valid liens upon the property; the interest had to be paid. If the creditors had taken the property, they would have been obliged to pay it. The payment was one made for their benefit and in their interest. It had no connection whatever with the fraudulent scheme, and it is impossible to perceive upon what principles of justice or equity an allowance for such a payment could be refused.

The case would be different if John Wilkinson were so situated that he was obliged to come into a court of equity and ask for affirmative relief that these claims be enforced against the property or paid out of it. Then the court might leave him entangled in the toil in which he himself had woven,—

the victim of his own fraudulent acts. But he ask nothing. He is on the defensive. He is bound to account for the rents, but claims that these sums have been expended out of them, and that he has only the balance for which he is accountable. The court could have compelled him to account either for the rental value of the property, or for the rents actually received; and if he had been compelled to account for the rental value, it would have been that value, with the interest, taxes, and repairs considered upon the question of the value; and the plaintiffs should not be in a better position when, instead of taking the rental value, which is really all they have lost, they take what he has actually received for rents, which must mean what he has received after the necessary deductions.

We are not quite so clear that an allowance ought to be made for the expense of collecting the rents. If John Wilkinson had done the work of collecting the rents personally, no allowance for that work could be made. But the property from which the rents came was very large and valuable, and it was placed by him in the hands of an agent who managed it and collected the rents, and we think that an allowance for commissions, which is an ordinary allowance in such cases, is proper. The rents came to him reduced by the amount of this charge, and in estimating the rental value of real estate, a charge of this kind would generally be considered.

But the claim for insurance rests upon different principles. That in no way, as it turned out, benefited any one. It was not an insurance for the benefit of the creditors, but solely for the benefit of John Wilkinson; and if the property had burned down, they could not have enforced it in their favor. In that event no one could have collected the insurance, excepting John Wilkinson, and he might have failed; and even if he had succeeded in getting the insurance money, it is not certain that these creditors would have been entitled to it or able to reach it: *Nippe's Appeal*, 75 Pa. St. 472; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Lerow v. Wilmarth*, 9 Allen, 382.

The finding of the referee in reference to the insurance is as follows: "That between the ninth day of December, 1884, and the first day of June, 1886, Mr. Chamberlain also paid for insurance upon the Globe Hotel property and the residences of J. Forman and Alfred Wilkinson, conveyed to John Wilkinson, the sum of \$2,136.91; that by the terms of a portion of said policies, the loss, if any, which would occur, was first

made payable to J. Forman and Alfred Wilkinson as executors of the last will and testament of John Wilkinson, the interest so sought to be protected being the mortgaged interests above described; that prior to the expiration of a portion of said policies, to wit, on the seventh day of October, 1886, with the consent of the insurers, a provision was inserted in the respective policies then in force providing that said policies insured John Wilkinson, J. Forman Wilkinson and the estate of Alfred Wilkinson, Charles E. Hubbell, and Albert K. Hiscock, as receivers under certain judgments of J. Forman and Alfred Wilkinson, and Charles E. Hubbell, as assignee of said Wilkinsons, as their respective interests may be determined; that the premiums on all of said policies were paid by Mr. Chamberlain."

It is impossible to perceive how any allowance could be made to John Wilkinson for the expense of insurance procured for the benefit of the mortgagees. But it appears that on the seventh day of October, 1886, by consent of the insurers, a provision was inserted in the policies then in force providing that they should insure John Wilkinson, J. Forman Wilkinson, and the estate of Alfred Wilkinson, Charles E. Hubbell, and Albert K. Hiscock, as receivers appointed in this action; and so far as the receivers themselves adopted the insurance, and thus secured its protection, it is proper that they should bear the expense thereof. But how much of the expense they should equitably bear was not shown, and cannot be ascertained from this record. It is possible that some apportionment of the expense of insurance ought to be made, and can be made, and if that be so, a further reference may be ordered, in the discretion of the supreme court, to ascertain the amount; but no allowance can now be made for it.

It is claimed, on behalf of John Wilkinson, that he should have been allowed his full claim for commissions paid his agent for collecting the rents, as found by the referee, to wit, \$2,123.31, and that the special term erred in allowing him only \$900 for that item. All the evidence was before the judge at the special term, and we cannot say that he erred in his estimate of the value of the services and the amount to be allowed as compensation therefor.

John Wilkinson actually paid upon the mortgages, which were liens upon the property, interest at the rate of seven per cent; but the referee and the special term credited him with interest at the rate of six per cent only. In this we think

there was no error. The mortgages had been long past due, and six per cent only could be demanded by the mortgagees. He could not claim credit for an over-payment. So far as the one per cent is concerned, the creditors derived no benefit whatever therefrom: *Bennett v. Bates*, 94 N. Y. 373.

Our conclusion, therefore, is, that the order of the general term should be reversed, and the order of the special term modified by striking out the credit of \$2,136.90 for insurance; and as thus modified it should be affirmed, without costs to either party, upon appeal to the general term and to this court.

Judgment accordingly.

FRAUDULENT CONVEYANCES. — A fraudulent grantee is substituted to the rights of his grantor in the property conveyed, which is subject only to the latter's creditors, and it is the right of the fraudulent grantee to demand that such creditors shall pursue strictly the procedure provided by law for the enforcement of their claims: *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587. But a fraudulent grantee of property holds the same in trust for the creditors of his grantor, and, like any other trustee, must hold it intact for their benefit: *Mason v. Pierson*, 69 Wis. 585.

COHEN v. NEW YORK.

[113 NEW YORK, 532.]

NUISANCE. — KEEPING OR STORING A WAGON IN THE PUBLIC STREET perpetually or habitually is a nuisance. Its owner can acquire no right under license from the municipality to maintain such nuisance.

NUISANCE — LIABILITY OF CITY FOR. — If a city, without authority, and in violation of statute, assumes to grant an individual the right to obstruct the public highway while in the transaction of his business, and for such privilege takes compensation, it must be regarded as itself maintaining the nuisance so long as the obstruction is continued by reason of and under its license, and must be liable for all damages which may naturally result to a third party who is injured in his person or property by reason or in consequence of placing such obstruction in the highway.

CITY IS LIABLE FOR INJURIES SUFFERED FROM KEEPING A WAGON IN ITS STREETS, when it was so kept there by its license, granted for compensation, and without authority, though the particular injury in question resulted from the negligence of the owner of the wagon in tying up its thills in a perpendicular manner, and from their falling upon and killing the person for whose death the action is brought.

ACTION by the administrators of Aschel Cohen to recover compensation for his death. The decedent was walking through Attorney Street, in the city of New York. A grocery wagon was in front of a store kept by one Marks. The thills

of the wagon were tied up in a perpendicular manner with a string, and the wagon stood parallel with the length of the street. The wagon was caught in some manner by the wheel of a passing ice-wagon and partly turned around, whereupon the thills fell down and struck the decedent upon the head, inflicting a wound from which he soon afterwards died. The wagon had been kept tied for several months in the same manner as at the time when the accident occurred. It was used by its owner, the grocer, to facilitate the transaction of his private business; but when not in actual use, was kept in front of his store day and night, under a permit granted to him by the defendant on the payment of two dollars. The trial court directed the jury to find a verdict for the defendant, on the ground that the cause of the injury was the defective fastening of the thills, of which there was no evidence that the city had any notice. The judgment of the trial court was affirmed at the general term.

Francis B. Chedsey, for the appellants.

Thomas P. Wickes, for the respondent.

PECKHAM, J. The storing of the wagon in the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public; and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owner of the adjoining premises, which it is not now necessary to more specifically enumerate. The extent of the right of such exceptional user was before us in the late case of *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, and nothing more need be said regarding it here.

It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable-yard, and a party cannot eke out the inconvenience of his own premises by tak-

ing in the public highway. These general statements are familiar and borne out by the cases cited: *King v. Russell*, 6 East, 427, decided in May, 1805; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, 3 Id. 230; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709; *Davis v. Mayor etc.*, 14 N. Y. 506, 524; 67 Am. Dec. 186; *Callanan v. Gilman*, *supra*.

Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies, in which the power to grant them for some purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it. As was said by Lord Ellenborough in the case of *Rex v. Jones*, *supra*, the law upon the subject is much neglected, and great advantages would arise from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. The defendant refers to sections 10 and 27 of chapter 27 of the ordinance of 1859. The former provides for an assignment by the mayor of a stand where the owner of a duly licensed public cart may let it remain waiting to be employed, and also a stand where it may remain at other times upon certain terms, etc. The latter section refers to a licensed cartman, and provides for storing his cart in front of his premises under certain regulations. Neither section has anything to do with a case like this. The legislature has expressly enacted that the city shall have no power to authorize the placing or continuing of any encroachments or obstructions upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the highway: Consolidation Act, sec. 86, subd. 4, pp. 25, 26; *People ex rel. O'Reilly v. Mayor etc.*, 59 How. Pr. 277; *Ely v. Campbell*, 59 Id. 333; *Lavery v. Hannigan*, 20 Jones & S. 463.

The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a public nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure, the legal power to grant the license to obstruct the

street was, by the legislature, withheld from the defendant, yet, nevertheless, it did grant just such a permit, and took compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. It was a nuisance, not by reason of the manner in which the thills were tied up, but because the wagon was stored in the street. It was not a mere negative attitude which the defendant adopted, such as would have been the case had it simply acquiesced in the manner in which the street was used. In this case it not only acquiesced in such use, but it actually encouraged it by making out and delivering a license to do it, and it received directly and immediately from the owner of the wagon a compensation for the erection and maintenance of a nuisance under the authority of such license. Under such circumstances the defendant must be held liable the same as if it had itself maintained the nuisance, for the owner of the wagon was nothing more than an agent through whom the defendant did this unlawful act: *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603. But assuming that the city had no right to issue the permit, it is urged that such license did not authorize the negligence which caused Cohen's death, and that the act of the defendant was too remote to be regarded as the proximate cause of the damage herein. We do not think so. The act of the defendant was wrongful, it consisted in setting up an obstruction in the public highway, and the accident happened because of the presence of the obstruction at the point in question. It was there by the act of the defendant, and being there it has caused the injury. To be sure, it may be said that if the thills had not been negligently tied, they would not have fallen. But that was simply the way in which, by reason of the presence of the obstruction, the accident occurred. There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there, or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage.

We think that in a case like this, where no obstruction would have existed but for the wrongful conduct of defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to

the manner in which he exercised the assumed right granted him by the license. The defendant, under these circumstances, must take the risk of such care, and not an innocent passer-by. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, or acquiescence in the use of the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not alone consist in the negligent manner of fastening up the thills; but the license itself, the permission, with or without a consideration, to obstruct the street at all for any such purpose as was the case here, is the wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction.

We do not say that this principle of responsibility would render the city liable in every case of a mistaken exercise of power authorizing the use or occupancy of a public street by an individual. We confine ourselves to the decision of this case, and we simply say that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway. This is none too severe a liability. It is to be hoped that its enforcement will tend to the discontinuance of a custom of granting permits or licenses to do what it is well known the city has no right to authorize or license. Such licenses, it is matter of public notoriety, are constantly granted without any semblance of legal authority, and the licensees are continually acting under them, and obstructing the public streets, to the serious inconvenience and danger of the public. When it is understood that such license has not only no effect in the way of legalizing an obstruction, but that it simply makes the city a partner in the maintenance of a

public nuisance, and liable for the damage caused thereby, such knowledge may, perhaps, restrain the utterly illegal practice, and tend in some degree to the protection of the public in the lawful use of its own highways.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

NUISANCES. — A license to maintain a nuisance, if granted by a board of supervisors, will not be permitted to substantially impair the rights of property holders: *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 58. A license by a city to erect steam cotton-presses is not conclusive that it is not a private nuisance, although the license is entitled, as evidence, to high consideration: *Ryan v. Copes*, 11 Rich. 217; 73 Am. Dec. 106. But the ringing of mill-bells at a certain hour having been enjoined as a nuisance, the legislature may authorize the ringing at that hour: *Sawyer v. Davis*, 136 Mass. 239; 49 Am. Rep. 27; to the same effect, see *Davis v. Sawyer*, 103 Mass. 289; 43 Am. Rep. 519.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

McCLOSKEY v. POWELL.

[123 PENNSYLVANIA STATE, 62.]

TRESPASS. — ONE WHO PROCURES A TRESPASS TO BE COMMITTED is liable with those who commit it.

TRESPASS. — UNDER PENNSYLVANIA STATUTE, act of March 29, 1824, giving treble damages for all timber cut and removed from the land of another without the owner's consent, a person who sells the right to cut timber upon land which he claims, but which in fact belongs to another, and who points out the lines, puts his vendee in possession, and receives the consideration, incurs, with his licensee, the penalty of the statute for all timber cut and removed by such licensee without the consent of the owner.

ACTION of trespass *quare clausum fregit* to recover damages for the cutting of timber trees. The facts appear in the opinion.

B. J. Reid and Rasselas Brown, for the plaintiffs in error.

C. Heydrick, for the defendant in error.

WILLIAMS, J. The several assignments of error in this case raise but a single question. The facts upon which that question is presented are not in controversy.

It appears from the evidence that Scatterd and Son, of Buffalo, New York, sent their agent, Ryder, into Elk County to purchase cherry timber. In his search he went upon two warrants owned by Mr. Powell, of Ridgway, on which he had heard there was cherry timber. He found a growth of valuable cherry and other hard woods in the neighborhood of Mr. Powell's lands, but was unable to determine whether it was

within Powell's lines or not. He accordingly went to see Powell, and told him if the grove he had seen was upon his land he would make a contract for the timber on warrants Nos. 2517 and 2545, but if that grove was not on the land he did not wish to do so. Powell promised to have his lines run and to let Ryder know the result. Not long after, he went with a surveyor and the necessary helpers to the warrants in question to locate the lines and the grove of cherry. The surveyor went to the southeast corner of 2545, a well-known corner, and ran west on the south line of the warrant in search of the southwest corner and the west line of 2545. That line was known to be not only the west line of the warrant, but the west line of Millstone township and of Elk County, and to be also an original district line. The surveyor missed the southwest corner, and ran more than one hundred rods beyond it, and far beyond the official distance, to a comparatively new corner made in the subdivision of one of the adjoining warrants. This he treated as the southwest corner of 2545, and turning north, ran and marked a new line as the western line of the warrant. This line included a large part of the grove of cherry timber to which Ryder had called attention. The true west line excluded the whole of it. The surveyor had his attention drawn to both the northwest and southwest corners of 2545, in the old district line, before he left the ground, but he nevertheless made a diagram showing his work, and a new line as the west line of 2545, and gave it to Powell, but told him of the old corners in the district line, as he alleges. Powell, acting upon the idea that the diagram was correct, and without any further investigation of the lines and corners of 2545, advised Ryder that a survey had been made, and the cherry found to be on his land.

A contract was accordingly made with him by Ryder, on behalf of his principals, for the hard wood on warrants Nos. 2517 and 2545. The timber was to be cut and taken away within three years, and to be paid for at the following rates: the cherry at ten dollars per thousand feet, the ash at seven dollars, and the poplar and cucumber at five dollars per thousand, board measure, the amount to be estimated on the stump. This estimate was to be made at once by Ryder on behalf of Scatcherd and Son, and by Frampton on behalf of Powell. The lines were to be pointed out by Frampton, who was with the surveyor when the new west line of 2545 was run and marked, a short time before, which inclosed the

cherry timber. The line pointed out was the new line which inclosed 260 acres west of the true line. Frampton and Ryder went to each tree thus appearing to be on 2545, marked and estimated it, and returned their estimate when completed to their principals. Ryder then went upon the ground for his principals, and cut and removed the timber under the contract, and the stumpage was promptly paid to Powell as it fell due. The owners of warrant No. 3158, within which the timber was, brought this action to recover treble the value of the trees so cut and removed, and they joined Powell, the vendor, Scatterd and Son, the vendees, and Ryder, the agent, as defendants in the action.

Powell denied his liability, because he had not personally felled the trees, or employed others so to do. The plaintiffs stated the ground on which they sought to recover in their first point, by which they asked the court to instruct the jury as follows: "If the jury believe, from the evidence, that Powell procured the west line of his lands to be so run and marked as to include some 260 acres of land belonging to the plaintiffs, and caused the hard-wood timber on his said lands to be estimated up to said line, and caused said line so run and marked to be pointed out as his line to J. H. Ryder, acting for Scatterd and Son, to whom he (Powell) had sold said hard-wood timber, and that said purchasers by reason of said acts of Powell cut the timber up to said line, and paid him the stumpage for the timber so cut on plaintiffs' land, or any portion of it, he (Powell) would be liable to the plaintiffs as a co-trespasser with the party or parties who actually cut the timber." The court answered this point in the negative. From an examination of the general charge, we understand the reason for this ruling to be that the action is brought under a statute which is penal in its character, and must not therefore be extended to any case not clearly within its provisions. The correctness of the rule thus invoked by the court below is beyond question, but its applicability in this case is more than doubtful.

The act of 1824 gives treble the value of timber cut and converted to be recovered against "any person who shall cut down or fell, or employ any persons to cut down or fell, any timber trees growing upon the land of another without the consent of the owner thereof." The trees for which the plaintiffs seek to recover were cut down upon the land of another, and without the consent of the owner. The only question is, Who

are the principals in the trespass? Ryder and his employees did the actual felling of the trees, but they had no interest in the timber,—no control over it, and no power to convert it. They were employed by Scatcherd and Son, who were not personally upon the ground, but who directed the movements of their employees. But how came Scatcherd and Son upon the close of the plaintiffs? They or their employees were put into the actual possession of the land and the timber by Powell, their vendor. He caused the line to be pointed out, and said in legal effect, "This land is mine, these timber trees are mine; I will sell them to you, and you shall cut and remove them, and pay me ten dollars per thousand feet for the cherry as it now stands on the stump."

If Ryder had cut the timber as a jobber for Powell, no one would question Powell's liability as a principal. There would have been in that event a direct employment to fell the trees. But if, instead of hiring Ryder to cut the trees for him, he had sold them to Ryder, thus securing his interest in them in advance, and leaving Ryder the risk and responsibility of the conversion of the trees into lumber, and the lumber into money, he equally encourages and directs the cutting. The terms of the contract are changed, but the relations of the parties to each other and to the timber trees remain the same. Powell is in either case the owner under whose title Ryder enters, and Ryder in either case fells the trees under the authority of Powell. The circumstance that Powell made his sale to Scatcherd and Son, who employed Ryder, does not in any manner change his position or his liability. When the trees were pointed out, counted, estimated, and sold to Scatcherd and Son, to be cut and removed for an agreed price per thousand feet, the authority to cut down the trees was given in the most clear and explicit manner possible. It was the very purpose of the sale, and by the terms of the written contract they were bound to cut the trees and remove them within three years, or lose their title to them after having paid the price fixed according to the estimate. They were bound absolutely to pay for the whole of the timber at the quantity estimated and at the price fixed in the contract, and they were distinctly authorized to cut and remove it. If Mr. Powell had gone upon the land with Scatcherd and Son's agent and said in so many words, "These trees are mine; I sell them to you at ten dollars per thousand as they stand; and I authorize you to cut them down, manufacture, and remove them," such

direction would have been no clearer, nor would it have made his position as a principal in the trespass any more apparent than does the contract of sale.

It is not contended that Powell would not be liable if this was the common-law action of trespass *quare clausum fregit*; but it seems to be thought that the same acts which would make him a principal if the action was in the common-law form will afford no basis for liability under the statute. This is a mistake. Powell would be a principal in the common-law action, not because he cut the trees with his own hands, but because he caused and directed the cutting. *Qui facit per alium facit per se*. For the same reason, he is a principal in the trespass when the action is under the statute. Whether the ax be used by himself, by his employee, his vendee, or one occupying no contract relation to him, is immaterial, for he cuts the trees who causes them to be cut: *Welsh v. Cooper*, 8 Pa. St. 217; *Fox v. Northern Liberties*, 3 Watts & S. 103. In the latter case it was said that a municipal corporation could become a trespasser by previously authorizing or subsequently ratifying the trespass of its officer. It is an elementary rule that he who procures a trespass to be committed is liable with those who commit it, and it has been often recognized in our cases: *McMurtrie v. Stewart*, 21 Pa. St. 322; *Welsh v. Cooper*, *supra*; *Frantz v. Lenhart*, 56 Pa. St. 365; *Deal v. Bogue*, 20 Id. 228; 57 Am. Dec. 702.

There is no hardship involved in the application of the rule to this case, for in good conscience he should bear the consequences of an act who caused or procured it to be done. Ryder, and the laborers who actually felled the trees, had no interest in the matter beyond their wages, and they did what their employers directed, and because they directed it. Their employers claimed no title to the land on which the trees were standing, but were put in possession by Powell, under a title which he asserted was in himself; and they directed the trees to be cut, because Powell had sold them as they stood for that very purpose, and as the legal and logical effect of such sale, had said: "These trees are mine; I sell them to you, to cut down and remove, and you must do it within three years." The mistake was Powell's, and out of that mistake all the consequences have come. He sold what he did not own, and took pay for it. He put his vendees on the ground to cut the trees. By his contract, he authorized and directed the work done under it, and he has no more reason in good

conscience than he has right at law to object to being held for the consequences of his own acts. If he had not done the acts enumerated in the point, no trespass would have been committed, and no action would have been brought. The point should have been affirmed.

The judgment is now reversed, and *venire facias de novo* awarded.

CO-TRESPASSERS — WHO ARE, AND THEIR LIABILITY: *Kirkwood v. Miller*, 5 Sneed, 455; 73 Am. Dec. 134, and extended note 137-149.

TREBLE DAMAGES FOR TRESPASS. — In Michigan, treble damages are punitive in their nature, and were not designed to be inflicted in any case not involving something like a willful wrong: *Michigan Land etc. Co. v. Deer Lake Co.*, 60 Mich. 143.

PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY v. LYON.

[123 PENNSYLVANIA STATE, 140.]

RAILROAD COMPANIES. — QUESTION OF REASONABLENESS OF RULE ESTABLISHED BY RAILROAD COMPANY, if the facts are undisputed, is a proper one for the court; but when such reasonableness depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court.

RAILROAD COMPANIES. — REGULATION OF RAILROAD COMPANY IS UNREASONABLE AND VOID under which the sale of tickets to any regular stopping station of a train is refused, or by which, although a passenger holding a through-ticket may himself get off at any such station, he is not permitted also to remove his baggage.

ANY REGULATION OF RAILROAD COMPANY THAT DEPRIVES PASSENGERS of the right to stop and receive their baggage at any regular station or stopping-place for the train on which they may be traveling is necessarily arbitrary, unreasonable, and illegal.

MEASURE OF DAMAGES IN TORTS COMMITTED through mistake, ignorance, or mere negligence, is compensation only; but in such as are committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely, but may, if the evidence justifies it, award vindictive or exemplary damages.

CORPORATIONS. — NATURAL PERSONS MAY DO WITH THEMSELVES AND THEIR PROPERTY WHATEVER IS NOT FORBIDDEN, but artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being.

ACTION on the case. The facts appear in the opinion.

A. M. Todd, for the plaintiff in error.

M. C. Acheson and A. W. Acheson, for the defendant in error.

STERRETT, J. One of the questions presented for our consideration is, whether the regulation of the railway company, in conformity to which its agents refused to sell plaintiff below a ticket to Birmingham station, and to check or deliver his baggage there, is unreasonable, and therefore unlawful.

The facts upon which that and subordinate questions depend are undisputed. It appears from the evidence that the company has five passenger stations within the corporate limits of Pittsburgh, viz.: Temperanceville, Point Bridge, Birmingham, Fourth Avenue, and Union Depot, the eastern terminus of the road. Birmingham station, about a mile south of the latter, and diagonally across the street from the eastern or terminal station of the Pittsburgh and Lake Erie railroad, is a regular stopping-place for passenger trains, and admittedly the most convenient point for transfer of passengers and baggage coming into the city on plaintiff in error's road, and proceeding westward by the Pittsburgh and Lake Erie road. In March last, the time between the arrival of morning train on the former and departure of train on the latter road was about twenty-five minutes, amply sufficient to make transfer from one road to the other at Birmingham station.

At the time above mentioned, plaintiff below bought from the Pittsburgh and Lake Erie company's agent at Washington, Pennsylvania, a ticket for passage from Pittsburgh to New Orleans. He then applied to plaintiff in error's agent for a ticket from Washington to Birmingham station, intending to proceed thence on his journey without any delay at Pittsburgh; but being informed that it would be necessary for him to buy a ticket to Union Depot station, he was obliged to accept that or nothing. He then requested that his baggage be checked to Birmingham station, or so marked that it could be delivered to him there. That was also refused, and he then notified the baggage-master that on arrival of train at that station he would demand and expect to receive his baggage. The demand was accordingly made, but it was unheeded, and the trunk was carried to the Union Depot. The alternative was thus presented of either waiting in Pittsburgh until he could obtain his baggage, or proceeding on his journey without it. He chose the latter, stopped off at Cincinnati, and there awaited the arrival of his baggage, which by his direction was obtained and forwarded after him.

The reasonable requests of plaintiff below were refused by the company's agents, in obedience to previous orders from

their official superiors, and not for the purpose of intentionally subjecting him to the inconvenience and annoyance that necessarily resulted, and which the officer giving the order must have known would result therefrom. The orders that were given were not disavowed by the company. On the contrary, it undertook to justify them as a valid and proper exercise of its power to make and enforce reasonable rules and regulations for the transaction of its business.

In view of the undisputed evidence of what occurred,—the inconvenience, annoyance, and delay to which plaintiff below was arbitrarily and unnecessarily subjected,—the learned president of the common pleas instructed the jury that the regulation in question was unreasonable and invalid. After reciting the facts, he said, among other things: "The question arises whether or not selling tickets to a certain point, or to the city of Pittsburgh, and allowing parties to get off at any of these stations under a ticket which would take them to the Union Depot station, they have a right to lay down a rule by which, although the party might get off himself, he would be compelled to go to the Union station for his baggage. I say such a rule is unreasonable, and one the company had no right to make, and therefore the existence of a rule of that kind with reference to passengers was a violation of their duty. While the inferior officers of the road may be justifiable in obeying the rule, yet it is such a rule that the company had no right to make, and they become responsible in damages if they undertake to enforce it as against passengers. I put it upon the broadest ground. But there is a narrower ground on which it might be put. It seems they did allow parties not only to get off themselves,—because that is unquestioned,—but they did allow certain parties—commercial travelers, parties holding thousand-mile tickets, and on some other occasions other parties—to get off and take their baggage off at that point. But it is immaterial whether or not the party is going by the Lake Erie road or going to Birmingham, or wherever he may go; it is a question of right so far as the citizen is concerned," etc.

It is contended that the above-quoted instructions, and others of like import, were erroneous, in that they entirely withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally

a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but if the facts are undisputed, the question is a proper one for the court: *Old Colony R. R. Co. v. Tripp*, 33 Am. & Eng. R. R. Cas. 488, 496, notes, and authorities there cited. As was said in *Vedder v. Fellows*, 20 N. Y. 126, 131, "there are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law rather than to the jury as one of fact. Ordinarily jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. . . . What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity."

The facts of the case at bar being undisputed, it was clearly the province of the court to say, as matter of law, whether the regulation in question was reasonable or not; and it was rightly held to be unreasonable and invalid. It was of such an arbitrary and vexatious character that no tribunal, court, or jury could well declare it otherwise.

Another question is, whether the case, as presented by the evidence, is one in which the jury should have been restricted to actual or merely compensatory damages. We think not. In actions on contract, except promises to marry, the amount recoverable is limited to the actual damages caused by the breach, the measure being the same whether the defendant fails to comply with his contract through inability or willfully refuses to perform it. But in torts the rule is different; the motive of the defendant becomes material. In those that are committed through mistake, ignorance, or mere negligence, the ordinary rule is mere compensation; but in such as are committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely. They may, if the evidence justifies it, give vindictive or exemplary damages, such as will not only compensate the injured party, but at the same time tend to prevent a repetition of the wrong, either by the defendant or others.

It is claimed that the regulation complained of was obstructive in its purpose, intended to prevent the transfer of passengers and there baggage from plaintiff in error's road to a rival railroad. The fact may be so, but it is unnecessary in this

case to inquire whether it is or not. It is enough to know that the traveling public have some rights, one of which is the transportation of themselves and baggage over any of the railroads of the commonwealth, and that includes the right to stop and receive their baggage at any regular station or stopping-place for the train on which they may be traveling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable, and illegal. The fact must not be ignored that corporations are artificial persons, created for specific purposes, and invested with such and only such powers as are conferred by law. While natural persons may do with themselves and their property whatever is not forbidden, artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being. Plaintiff in error was incorporated as a common carrier of freight and passengers. As such it owes a duty to the traveling public which it cannot arbitrarily and willfully ignore.

It is unnecessary to further consider either of the specifications of error. The case was correctly tried, and plaintiff in error has no just reason to complain of the result.

Judgment affirmed.

RAILWAYS. — RULES MAY BE ADOPTED BY CARRIERS OF PASSENGERS, provided such rules are reasonable; as, for example, that coupons will not be accepted unless detached by or in the presence of the conductor: *Boston etc. R. R. Co. v. Chipman*, 146 Mass. 107; 4 Am. St. Rep. 293, and note 294; or that a certain car shall be used exclusively by ladies, and gentlemen accompanied by ladies: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627; 4 Am. St. Rep. 776; note to *Commonwealth v. Power*, 41 Am. Dec. 481; *Bass v. Chicago etc. R'y Co.*, 36 Wis. 450; 17 Am. Rep. 495; compare *Chicago etc. R'y Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641. In the absence of statutory provisions to the contrary, railway corporations may adopt rules that trains shall not stop at designated stations: *Atchison etc. R. R. Co. v. Gante*, 38 Kan. 608; 5 Am. St. Rep. 780; *Ohio etc. R. R. Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104. A regulation requiring a passenger who desires to stop over to procure stop-over tickets is reasonable: *Yorton v. Milwaukee etc. R'y Co.*, 54 Wis. 234; 41 Am. Rep. 23.

EXEMPLARY DAMAGES ARE RECOVERABLE FOR GROSS NEGLIGENCE AND FOR MALICIOUS ACTS: *Seely v. Alden*, 61 Pa. St. 302; 100 Am. Dec. 642; *Peoria Ass'n v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263; *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574; *Selden v. Cushman*, 20 Cal. 56; 81 Am. Dec. 93; *Doss v. Missouri etc. R'y Co.*, 50 Mo. 27; 21 Am. Rep. 371; *Taylor v. Grand Trunk R'y Co.*, 48 N. H. 304; 2 Am. Rep. 229; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6; for moral turpitude in addition to mere negligence: *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366; 74 Am. Dec. 260; for wrongful, insulting, and reckless acts: *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332; *New Orleans etc. R. R. Co. v. Statham*, 42

Miss. 607; 97 Am. Dec. 478; *Chiles v. Drake*, 2 Met. (Ky.) 146; 74 Am. Dec. 406; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341; *Matthews v. Warner*, 29 Gratt. 570; 26 Am. Rep. 396; *Philadelphia etc. R'y Co. v. Larkin*, 47 Md. 155; 28 Am. Rep. 442; *Atlantic etc. R'y Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Palmer v. Railroad*, 3 S. C. 580; 16 Am. Rep. 750; *Cincinnati etc. R. R. Co. v. Cole*, 29 Ohio St. 126; 23 Am. Rep. 729. But in the absence of gross negligence, malice, wrong, recklessness, insult, wantonness, or aggravating circumstances, the damages will be limited to actual damages, and punitive or exemplary damages cannot be recovered: *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374; *Heil v. Glanding*, 42 Pa. St. 493; 82 Am. Dec. 537; *Hoy v. Grenoble*, 34 Pa. St. 9; 75 Am. Dec. 628; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332; *Chicago v. Martin*, 49 Ill. 241; 95 Am. Dec. 590; *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574; and for a general discussion of exemplary damages, what is, when recoverable, etc., see note to *Stutz v. Chicago etc. R'y Co.*, 9 Am. St. Rep. 769; notes to *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 344; *Freidenheit v. Edmundson*, 88 Id. 144; *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379; *Rowe v. Moses*, 67 Id. 562; *Austin v. Wilson*, 50 Id. 768; *Merrills v. Tariff Mfg. Co.*, 27 Id. 688; and principal case of *Austin v. Wilson*, 4 Cush. 273; 50 Am. Dec. 766.

ACTUAL DAMAGES DISTINGUISHED FROM EXEMPLARY DAMAGES, AND WHAT SHOULD BE INCLUDED IN THE FORMER ONLY: *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608, and note 616.

BIGHAM'S APPEAL.

[123 PENNSYLVANIA STATE, 262.]

MARRIED WOMEN — ESTOPPEL. — Proposition that married woman cannot be estopped by her own act is by no means of universal application, even as between private parties.

MARRIED WOMEN — ESTOPPEL TO DENY VALIDITY OF DECREE. — Decree of court procured to be made by married woman will not be set aside at her instance after the termination of her coverture on the sole ground of her want of power to consent to the decree by reason of her coverture, where for a long period of time she has enjoyed the fruits of the decree, and she is the only person who complains of it. She is clearly estopped in such case from asserting the invalidity of the decree.

TRUSTS — RECONVEYANCE OF TRUST ESTATE SUSTAINED. — A single woman, just prior to her marriage in 1846, made a deed of trust of all her property to a trustee, for her sole and separate use, without power in her to alien or encumber, but with a power to dispose of by will. In 1849, upon a bill or petition by the trustee, and a concurring answer signed by the *cestui que trust* and her husband, the court decreed a reconveyance to the *cestui que trust* of the entire property and estate, and a deed of reconveyance was accordingly executed and delivered. In 1867, after the death of the husband, the widow and former *cestui que trust* appealed from the decree made in 1849, alleging that she had no power to consent to it, being a married woman, and that the same was erroneous. In such case, the appellant having reaped the full benefit and advantage of the decree, made upon her own request, and continued to do so for an

uninterrupted period of thirty-eight years, and moreover, as the death of her husband effected the same result as the decree, no judgment that the appellate court could render would re-establish the deed of trust, and re-clothe her with the fettered estate which she held under its operation, the decree should not be reversed, even if erroneous.

R. B. Carnahan and T. D. Carnahan, for the plaintiff in error.

C. S. Fetterman, for the appellees.

GREEN, J. This is a curious and an extraordinary case. The appellant asks us to reverse a decree made by the old district court of Allegheny County in the year 1849, upon an appeal which was not taken until the year 1887. She claims that she was under the disability of coverture from the time of the decree until November 9, 1884, when her husband died, and that she was entitled to five years from the death of her husband within which to take her appeal, under the act of 1791, because the act of 1874, which limits the time to two years, does not apply to cases in which the judgment or decree was entered prior to its passage.* In 1846, just before her marriage, she had made a deed of trust of all her property, real and personal, to a trustee, to hold it for her sole and separate use, without power of alienation or encumbrance. She had, however, a power to dispose by will of the whole trust estate. The trustee accepted the trust, and performed its duties until, in 1849, when, by a proceeding in the form of a bill or petition, and an answer, signed by both the appellant and her husband, in the district court of Allegheny County, that court was induced to and did make a decree directing the trustee to reconvey to the appellant the entire property and estate which had become vested in him by virtue of the deed of trust. In the answer, the appellant and her husband describe themselves as "defendants in this bill," and they "severally waive the issuing and service of a subpoena," and severally make answer to the bill, admitting all its averments, and formally consent that the decree prayed for shall be made. The decree was made on the same day—April 28, 1849—that the bill and answer were filed; and on the ninth day of May, 1849, the deed of reconveyance was executed and delivered, recorded in the proper office on the 9th of June, 1874; the entire estate remaining in the hands of the trustee was delivered to the appellant, the trustee retired from his trust, and never after performed any of its duties.

The deed of reconveyance ostensibly re clothed the appellant with the absolute ownership of the property in question, so that thereafter she was apparently vested with the unclogged estate in fee-simple in her lands in the same manner and with the same effect as she held the same immediately prior to the execution of the deed of trust. It is not possible to say of the decree which produced this result that it worked any injury to the appellant, or to her interests or rights, since it gave her a larger estate in her lands than she held before it was made. She is therefore not in the category of ordinary suitors in the appellate courts who seek the reversal of adverse decrees made in the lower courts upon the ground that those decrees affect their rights, interests, or estates injuriously. Nor can she say that the decree in this case was made in opposition to her wishes. On the contrary, it was made at her instance, — by her requirement, — upon the express solicitation of herself and her husband, in a formal and ceremonious application by them both for that very purpose. It is idle to speak of the proceeding in the district court as a proceeding by the trustee for his mere discharge. It was beyond all question a proceeding in the interest of the appellant for the specific purpose of doing away with the deed of trust, and of giving her the absolute ownership of her estate instead of the limited and restrained interest which she held under the trust. She asked the district court of Allegheny County to make that decree; and it was made because she asked it. She reaped the full benefit and advantage of the decree, and continued to do so for an uninterrupted period of thirty-eight years, — indeed, for several years after her disability of coverture was removed by the death of her husband. After his death, she became seised absolutely in fee-simple of her real estate, precisely as she was before the deed of trust was made.

The law has now done for her precisely that which the decree of the court did for her if it was a valid decree, and if we should now reverse that decree because it was unadvisedly made, we would be doing a vain and useless thing. We cannot now restore the trust. No judgment that we can now render will re-establish the deed of trust, and re clothe her with the fettered estate which she held under its operation.

If we should now hold that the decree was erroneous because her power over the trust estate could not be enlarged by herself or by a court, it would be a mere *brutum fulmen*; it would accomplish nothing; she would still hold the estate in

fee-simple, and unfettered, as well after such a ruling by us as before. Practically, we would be merely expressing the opinion that the district court, in the year 1849, committed an error in rendering a judgment. Why should we do this? Is there any reason appearing on this record why we should now reverse that judgment? Absolutely none. It does not appear that any conveyance has been made by her by virtue of the decree, which she desires, or which it is her interest, now to have avoided or defeated. So far as this record discloses, she always did hold her estate during the life of her husband; whether upon the trusts of the deed or not is immaterial, as no practical question in relation to that tenure is raised, and since his death she holds it free of the trust, notwithstanding any decision we may or can make regarding it. If her husband were still living, and he and she were seeking to restore the trust estate, we could at least see how a decree of reversal might produce an effect different from that produced by the decree. Or if she had made some conveyance of her lands or a part of them, and was now seeking to invalidate it by showing the invalidity of the decree, we could of course perceive a reason for asking our intervention. But there is nothing of that kind on this record. The death of appellant's husband, in 1884, is averred in the history of the case, and not denied, and indeed, is essential to her right of appeal after the long delay in its exercise, and as his death reverts her as of her former estate in the lands, we are bound to take notice of the fact, and give it its proper consequence in the case. We are therefore not made acquainted with any matter of fact by anything appearing on this record, which either requires us to interfere, or justifies us in reversing the decree of the court below in the very extraordinary circumstances in which we are asked to exercise our authority, and that consideration alone is a sufficient reason for refusing to do so.

But there are other reasons equally cogent. The appellant is the only person who complains of the decree. But it was made because she asked it to be made. It was she who procured it. How can she now ask us to say that the district court committed error in making a decree which she herself solicited. She did not say in that court that it was error to do so. She took no exception to it there. If she asked that court to make the decree, how can she ask us to unmake it? If she were *sui juris* at that time, as a matter of course she

would not be heard in error here. But why should she be allowed such a privilege on account of her coverture? Married women have no license to do such unconscionable and unreasonable things as this, especially when they have enjoyed the fruits of the judicial action they solicited and procured for nearly half a century. Courts of justice are not convenient playthings to be used by designing persons for their private purposes, even though they be married women. Such tribunals cannot be expected to stultify themselves in order to gratify the wrongful or dishonest purpose of a litigant because she has a husband. It must be borne in mind that it is the decree of a court that is proposed to be set aside, and not a mere transaction between private parties. But even as between private parties, the proposition that a married woman cannot be estopped by her own act is by no means of universal application.

In *Couch v. Sutton*, 1 Grant Cas. 114, we held that a married woman may be estopped from claiming under an unrecorded deed, if she sees one in possession, and making valuable improvements, under a title that is good against any other title that she may have, and he has no notice or knowledge of her title under such deed. In *McCullough v. Wilson*, 21 Pa. St. 436, we held that though a mortgage by husband and wife were invalid as to the interest of the wife, and a judgment thereon invalid for want of description of the premises, yet after *levari facias* and *alias levari facias* issued thereon describing the premises, if the husband and wife procure a person to purchase the mortgage, they and their heirs are estopped from denying the validity of the mortgage and judgment thereon, and are concluded by a sheriff's sale of the premises under such proceedings. Lowrie, J., in delivering the opinion, said: "May a married woman thus bind herself by acting with her husband? Why not? The fact that she can be sued with her husband entitles her, with him, to do all proper acts relative to the defense of her rights that are involved in the suit. It was proper for her interests that she and her husband should make an arrangement for time in order to prevent a sacrifice of her property. Both are therefore bound to all the consequences of the arrangement."

In *Fryer v. Rishell*, 84 Pa. St. 521, we decided that where a married woman has received full consideration for her assignment of a balance due her on a sale of her separate estate, and by her own act has disabled herself from restoring the

consideration, equity will not permit her to repudiate the assignment on the ground that she had not acknowledged the same. Mercur, J., in the course of the opinion, said: "When a married woman asks to be relieved from her contract, equity requires that the rights of the other party shall be regarded. In strict law a married woman has no power alone to give a valid bond and mortgage to secure the payment of purchase-money on real estate which she has bought, yet when necessary to prevent great injustice they will be enforced in equity according to the necessities of common justice: *Glass v. Warwick*, 40 Pa. St. 140; 80 Am. Dec. 566." In *Brown's Appeal*, 94 Pa. St. 362, a married woman loaned money to her husband out of her personal estate, and as security therefor took a judgment in the name of a trustee. To enable her husband to obtain a new loan, she certified in writing, with the assent of her husband, that the judgment to secure this new loan should take precedence of her judgment. This certificate was entered on the record and attested by her husband, and the loan was then made and the judgment given. The husband's real estate was sold at sheriff's sale, and in distributing the proceeds, held, that this certificate was an executed contract, and operated as an immediate and unconditional release of her prior right of lien to the amount of the new judgment, and she could not repudiate it on the ground that she was a *feme covert*.

In *Powell's Appeal*, 98 Pa. St. 403, we held that a married woman may at her husband's request execute to him a valid and effectual release of a legacy charged upon land whereof he is seised, without his joinder and without a separate acknowledgment. Where there is no consideration for such a release, and the married woman does not intend the same as a gift, it is invalid as to her husband, and as to such of his creditors as stand on his footing. As to such of her husband's creditors as have advanced their money subsequent to the execution of the release with knowledge thereof, and on the faith of the same, the married woman will be estopped from denying its validity. In *Grim's Appeal*, 105 Pa. St. 385, we said, Clark, J.: "A married woman should be held to the observance of that good faith in her dealings with the world to which others are bound; her protection is for the prevention of fraud; she should not thereby be enabled with impunity to defraud others."

Without continuing these citations, it is enough to say that this appellant was competent to appear in the district court

jointly with her husband and ask for the decree that was made revesting her estate in her lands in herself absolutely. It was not a decree divesting her of any estate, but increasing that which she already held. It was not to her disadvantage, but to her benefit, to have this done. Our refusal to disturb that decree is not divesting her of her title by way of estoppel, and hence the cases which hold that a married woman cannot be deprived of her title to land by estoppel are not applicable. There is therefore no reason arising out of that doctrine why we should now convict the district court of error, at the instance of the appellant, in making a decree almost forty years ago which she herself asked and induced that court to make.

If, however, as matter of fact, she availed herself of that decree, and made sales or mortgages of her lands by virtue and upon the faith of it, and obtained money from such purchasers or mortgagees, which she has never restored, but still holds, then there is the strongest possible reason why we ought not to reverse that decree at this late date upon her application. Such purchasers or mortgagees are not parties to this proceeding; they are not before us and have had no hearing; and it would be a judicial outrage to deprive them of their titles without notice, without a trial, and without their having a day in court, upon the mere application of their grantor, who has taken their money by means of the very decree she now seeks to avoid. That which we are asked to do is a gross anomaly, to wit, to reverse the decree of a lower court at the instance of the party who procured it to be made. The anomaly is still more gross because of the fact that the decree is not injurious to the appellant, but beneficial, increasing and enlarging her estate, and in no sense diminishing, injuring, or impairing it. No reason founded upon any possible injury to her for such extraordinary action on our part appears upon the record. She has acquiesced in the decree for nearly forty years, and we can imagine no possible reason of an honest, equitable, or legitimate character for our taking such a step. We can very easily understand how a reversal of this decree now may operate to the great injury of innocent persons who are not before us, and who may have acted upon the faith of the decree; and this consideration admonishes us that we ought upon no account to interfere with the existing state of things, except upon the most extreme and urgent cause. As no such cause is shown, we decline to interfere. There can be no question that the district court had jurisdiction of the subject-matter, and if

there was any objection as to the form of the proceeding, the appellant alone is responsible for it, and cannot now be heard to aver her own wrong in this respect.

Decree affirmed, and appeal dismissed at the cost of the appellant.

MARRIED WOMEN — ESTOPPEL. — THE DOCTRINE OF ESTOPPEL APPLIES TO MARRIED WOMEN as to all acts performed by them since the adoption of the South Carolina constitution of 1868: *Crenshaw v. Julian*, 26 S. C. 283; 4 Am. St. Rep. 719. For the general doctrine of estoppel as applied to married women, see *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524, and note 525; *McHenry v. Day*, 13 Iowa, 445; 81 Am. Dec. 438; *Dann v. Cudney*, 13 Mich. 239; 87 Am. Dec. 755, and note; *Hodges v. Powell*, 96 N. C. 64; 60 Am. Rep. 401, and note. A married woman is estopped from denying her positive representations made to a mortgagee, who, acting in good faith, and having no knowledge that the facts stated are untrue, is induced thereby to take a mortgage upon her real estate: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621; but in North Carolina it has been decided that unless there is an element of fraud in a married woman's conduct or representations, she will not be estopped by a contract: *Wethersbee v. Farrar*, 97 N. C. 106.

McINTYRE v. McINTYRE.

[123 PENNSYLVANIA STATE, 829.]

WILLS — CONSTRUCTION — PRECATORY BEQUEST. — A will proved prior to the Pennsylvania wills act of 1833 contained an introductory paragraph, which provided: "And to such worldly estate wherewith it hath pleased God to intrust me, I dispose of the same in the following manner." In a subsequent clause was a devise as follows: "I will and bequeath to my daughter, Mary McIntyre, the one half of the land that I possess above the road, that is, the north end. She will not have power to sell, but may leave the same to her children." In such case, the first sentence of this clause, construed in connection with the introductory paragraph, passes a fee, unaffected by the attempted restraint upon alienation contained in the second sentence of said clause; and the additional words of the second sentence, "but may leave the same to her children," are precatory only, and not obligatory, and so cannot defeat the otherwise operative effect of the devise.

CASE stated in ejectment, wherein J. McIntyre and R. McIntyre, by his committee, were plaintiffs, and Mary Ann, Joseph, Sarah, Isabella H., and D. R. McIntyre were defendants. James Boyle died in 1830, leaving a last will, dated January 4, 1830, probated July 24, 1830, by which the land in dispute was devised to his daughter, Mary McIntyre, who, having occupied the land during her lifetime, died in 1881, having devised all her estate to her three daughters, the defendants Isabella, Mary Ann, and Sarah, but without making

any description of the real estate or reference to the power given her in the will of James Boyle, the material provisions of which appear in the opinion. At the time of her death, Mrs. McIntyre left surviving her seven children, two being the plaintiffs named, and five being the defendants named; also two grandchildren, the children of a deceased son, who were not parties to the suit. The defendants were in possession, and refused to recognize the plaintiffs as tenants in common of the land, and also refused to allow them to participate in the rents and profits. The court below found that the plaintiffs were entitled to the undivided two eighths of the land. The defendants assigned as error: 1. In ruling that the children of the deceased brother were entitled to one share; 2. In entering judgment for the plaintiffs for the undivided two eighths of the land, instead of two sevenths, as agreed on in the case stated.

R. A. Balph and James Balph, for the plaintiffs in error.

Alexander M. Watson, Thomas M. Marshall, and A. M. Imbrie, for the defendants in error.

GREEN, J. The will of James Boyle, having been proved prior to the passage of the wills act of 1833, must be interpreted in accordance with the law as it was then established. In the case of *Schrivver v. Meyer*, 19 Pa. St. 87, 57 Am. Dec. 634, construing a will executed in 1831, we held that where the testator preceded his devise by the words, "As to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner," he thereby evinced such an intent to dispose of his entire estate in his lands as to pass a fee-simple estate in lands devised without words of inheritance. This case was followed by the same ruling in *Wood v. Hills*, 19 Pa. St. 513. In the will of James Boyle, the introductory words are: "And to such worldly estate wherewith it hath pleased God to intrust me, I dispose of the same in the following manner." To these words the foregoing decisions are directly applicable, and the testator's apparent intent is fortified by a consideration of the other parts of his will. He gives all his estate to his wife during her life, and then disposes of it in detail to various legatees and devisees. In the sixth clause, he directs as follows: "I will and bequeath to my daughter, Mary McIntyre, the one half of the land that I possess above the road; that is, the north end. She will not have power to sell, but may leave

the same to her children." The first sentence of this clause undoubtedly, in connection with the introductory words, gives a fee to Mary. It is equally clear that the attempted restraint upon alienation contained in the first part of the second sentence is void, as being in conflict with the fee given by the preceding sentence. The only remaining question is as to the effect of the additional words of the second sentence, "but may leave the same to her children." Do these words reduce the estate of Mary from a fee to a life estate, with a power of appointment to her children? If the words were imperative, if the word "shall" were used instead of the word "may," there would be great, perhaps controlling, force in the proposition that the words, taken together, were so indicative of an intent to limit Mary's interest to a life estate that we would be obliged to hold that, both before and after the act of 1833, her interest was a life estate only. But when the testator says simply that she may leave the land to her children, and does not say that she may not leave it in any other way, we cannot say that he does anything more than merely express a hope or desire that she may so leave it.

It seems to us the word "may" is precatory only, and not obligatory, and if so, it cannot defeat the otherwise operative effect of the devise. In *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718, a testator, after directing the payment of his debts, provided as follows: "Item, I will and bequeath unto my dear wife, Martha Pennock, the use, benefit, and profits of all my real estate during her natural life; and also all my personal estate of every description, including ground-rents, bank stock, bonds, notes, book debts, goods, and chattels, absolutely; having full confidence that she will leave the surplus to be divided at her decease justly amongst my children." We held that the absolute ownership of the personal estate was given to the widow, and that no trust in favor of the children was created by the precatory words. The widow having left a will disposing of her estate without reference to the will of her husband, and providing for but three of her seven children, that disposition was sustained by this court in a most exhaustive opinion by Lowrie, J. He reviewed the ancient equity doctrine of the English chancery by which trusts were sometimes founded upon mere precatory words, and showed that it was not the law in Pennsylvania, and was fading out in England.

In *Burt v. Herron's Ex'rs*, 66 Pa. St. 400, we held again that

mere precatory words will not convert a legatee or devisee of an absolute gift into a trustee, unless it affirmatively appears they were intended to be imperative, and the distinction was pointed out between such words and those which express a desire or request as to the direct disposition of the estate.

Kinter v. Jenks, 43 Pa. St. 445, is another instance in which a devise to a wife with the expression of a confidence that she would dispose of it amongst the children, was held to give her an absolute estate with an unrestrained power of disposition, and not a mere life estate with a power of appointment to the children. *Biddle's Appeal*, 80 Pa. St. 259, also illustrates the absolute power of a wife over a fund which she was to use in the maintenance and education of the testator's children, but without liability to account.

Returning to the present case, we repeat that we can only regard the devise of James Boyle to his daughter Mary as an absolute devise of the land in question, accompanied with a void restraint upon alienation, and the expression of a permission to leave the land to her children, but without the prohibition of any other disposition she might choose to make. This being so, the devise to her three daughters passes to them the whole estate in the land, and the plaintiffs are not entitled to any part of it.

Judgment reversed, and judgment is now entered for the defendants, with costs.

WILLS—RESTRICTION OF ALIENATION.—There never has been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee-simple, in possession, or remainder, against selling for a particular period of time was valid by the common law, and a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void: *Mandelbaum v. McDowell*, 29 Mich. 78; 18 Am. Rep. 61. Conditions in restraint of alienation are to be strictly construed, as they are against the policy of the law: *Brothers v. McCurdy*, 36 Pa. St. 407; 78 Am. Dec. 388.

WILLS—PRECATORY WORDS.—Where a testator gave and bequeathed all his property to his wife, "only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good," the gift to the wife was absolute: *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572. And in Maryland, where a testator provided as follows: "It is my will and desire, and I hereby devise and bequeath all my property, real and personal and mixed, to my dear wife, E. A., and her heirs and assigns forever, and it is my request and desire that my said wife should, by last will and testament, devise and bequeath all of said property at her death remaining in her possession to my friends B. W. and E. W., their heirs and assigns forever, share and share alike,"—no trust was created, and E. A.'s estate was absolute: *Williams v. Worthington*, 49 Md.

572; 33 Am. Rep. 286. But in Wisconsin, where a testator gave all his real and personal property to his wife, her heirs and assigns forever, "having full confidence in my said wife, and hereby request that at her death she will divide equally between my sons and daughters all the proceeds of my said property, real and personal, hereby bequeathed," the wife took a life estate only, with a remainder in trust for the children: *Knox v. Knox*, 59 Wis. 172; 48 Am. Rep. 487. For the general doctrine of precatory words creating what are called precatory trusts, see note to *Knox v. Knox*, 48 Am. Rep. 494-499; *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544, and note 548; *Anderson v. Hammond*, 2 Lea, 281; 31 Am. Rep. 612. Effect of a precatory paper accompanying a bequest of personalty: *Magoohan's Appeal*, 117 Pa. St. 238; 2 Am. St. Rep. 660. Compare the case of *Phillips v. Phillips*, 112 N. Y. 197; 8 Am. St. Rep. 737; note to *Harrison v. Harrison*, 44 Am. Dec. 372-379.

DICKSON v. HOLLISTER.

[123 PENNSYLVANIA STATE, 421.]

NEGLIGENCE. — IT IS DUTY OF PROPERTY OWNER WHO MAINTAINS COAL-HOLE IN CITY SIDEWALK in front of his premises to exercise reasonable care and diligence in keeping it safe and secure, such owner being bound to know that persons will pass and repass, and step upon the cover without apprehending danger, not only in the daytime, but also in the nighttime.

NEGLIGENCE. — TO CHARGE PROPERTY OWNER WITH NOTICE OF DEFECTIVE CONDITION OF COAL-HOLE which he maintains in a city sidewalk in front of his premises, it is not necessary, in order to affect him with negligence, that the defect should be so notorious as to be evident to all pedestrians passing in the immediate neighborhood. Whether the cover was made and adjusted in a way that was reasonably safe and secure is a question for the jury.

NEGLIGENCE. — IT IS DUTY OF PEDESTRIAN UPON PUBLIC HIGHWAY TO USE reasonable care for his own safety, and to avoid an open or apparent danger; but as the cover of a coal-hole in a sidewalk constitutes a part of it for persons to tread upon, a passer-by is not guilty of contributory negligence in failing to exercise that critical care which would involve a particular examination of its structure and adjustment before stepping upon it.

NEGLIGENCE — INDEPENDENT CONTRACTOR. — Where a blacksmith is employed by a property owner to secure the cover over a coal-hole which the latter maintains in a sidewalk in front of his premises, the former, being subject to the direction and control of his employer, and liable to be dismissed at any stage of the work, is not to be regarded as an independent contractor, for whose negligence the property owner would not be liable.

NEGLIGENCE — PROXIMATE CAUSE. — In action for damages for personal injury sustained by the plaintiff through the alleged negligence of the defendant, resulting in a wound in which erysipelas developed in a few days from occult causes not attributable to treatment, improper habits, or peculiar constitutional tendencies, it is not error to instruct the jury that even if the erysipelas was not the immediate result of the injury, it might nevertheless be regarded as part of the injury itself.

D. T. Watson and A. H. Clarke, for the plaintiffs in error.

Thomas M. Marshall, Jr., and A. M. Imbris, for the defendant in error.

CLARK, J. This suit was brought to recover damages for a personal injury sustained by the plaintiff from falling into a coal-hole in front of defendant's premises on Ninth Street, in the city of Pittsburgh, on April 10, 1886. The opening was in the sidewalk of a public street, in a populous and much-frequented portion of the city, and was used for the defendant's private convenience. It was his duty, therefore, to exercise reasonable care and diligence, not only in making but in keeping it safe and secure. He was bound to know that persons would pass and repass on this pavement, not only in daytime, but in the night-time also, and that as the opening was in the center of the sidewalk, they would, without apprehending danger, step upon the cover which he placed over it. It is quite certain that this cover was not secure, or it would not have turned; and the jury has found that its insecure condition was owing to the defendant's want of due diligence and care concerning it. It is absurd to say that, in order to charge the owner of the premises with notice, "the defect must be so notorious as to be evident to all pedestrians passing in the immediate neighborhood." Whether the cover was made and adjusted in a way that was reasonably safe and secure was for the jury, and that question was fairly submitted.

Was the plaintiff guilty of contributory negligence? Upon a careful examination of the whole case, we find no evidence to justify any such inference. The following extracts from the testimony of Mr. Hollister are quoted and relied upon as tending to show contributory negligence on his part. He says:—

"The pavement was apparently all right; I was going along, and I stepped on this coal-hole cover, which went out in front of me, and I went in. It was done so quickly I could not tell how it went out; it either slipped from not being properly placed on, or else it turned,—one of the two."

"Q. Did you notice this coal-hole covering at all before you stepped on it? A. I noticed it as any man would notice anything along the street.

"Q. Was there anything apparently wrong with it? A. No, sir; it was apparently all right, or I should not have stepped on it.

"Q. So far as you could tell, it was resting properly in the rim that supported it? A. I don't look down to know that in regard to every coal-hole I come to.

"Q. If it had been displaced you probably would have noticed it? A. I might have noticed it, and might not; it is evident I did not notice it; it is evident it was displaced, and I did not notice it.

"Q. Of course you have no knowledge of it further than that it let you down? A. That is all. I looked at it as it lay there to see what had been the cause of my going in there, and found—I saw there were pieces attached to it—little pieces of iron—three of them, I think—attached to the side of it; the front side had none attached, and it was the front side, towards Penn Avenue, I stepped on; my impression was, it was slightly displaced, and as I stepped on it, it revolved on these two places, and went in front of me and let me in."

It is the duty of every pedestrian upon a public highway to use reasonable care for his own safety, and to avoid an open or apparent danger. But as the cover was placed in the pavement as a part of it for persons to tread upon, it is plain that Hollister was not bound to exercise that critical and extreme care which would involve a particular examination of its structure and adjustment before stepping upon it. He had a right to assume that not only the public, but private owners, had performed their duty, unless there was something reasonably apparent to give him notice, or cause some apprehension of danger, when, of course, a greater degree of care would be required; and there is not the slightest proof that he had any such warning.

Farrell was not an independent contractor; he was a mere servant; he was subject to the direction and control of Dickson, and might have been dismissed, and another person employed, at any stage of the work.

Although, according to the testimony of the medical experts, erysipelas is not a necessary consequence of such an injury, yet it is conceded that in frequent instances it does follow flesh-wounds. The causes which produce erysipelas would seem to be obscure; the modern theory is, that erysipelas is the result of some specific poison which enters the system through the exposure of a wound; but the nature of this poison, and the conditions under which it operates, are not well understood. The disease was, however, a development which might fairly have been anticipated as a result of

the injury; and as in this instance the disease developed in the wound, it was a reasonable inference of the jury that if there had been no wound there would have been no erysipelas. There is no intimation that erysipelas intervened from any want of care or skill on part of Dr. Orr, or that proper precautions were not taken by the use of antiseptics, etc., in the treatment of this wound. On the contrary, it is conceded that the disease, if not the necessary and usual result, frequently occurs in such cases. The negligence of the defendant may therefore be regarded, not only as the direct cause of the wound, but of the disease, which, from occult causes not attributable to treatment, improper habits, or peculiar constitutional tendencies, frequently develops from personal injuries. It was in this view of the case the court instructed the jury that even if the erysipelas was not the immediate result of the injury, it might, nevertheless, be regarded by the jury as part of the injury itself. Nothing intervened to produce this disease other than might have been fairly anticipated as the direct, although not the necessary, result of the injury; as well might we attribute the contact of the atmosphere, or the microscopic existences therein, as an intervening cause in such cases.

Upon an examination of the whole case, we find no error, and the judgment is affirmed.

SIDEWALKS, OPENINGS IN — NEGLIGENCE. — The right to keep openings in sidewalks in front of one's premises, if it exists at all, must come from legislative declaration, municipal license, or general usage. And one who maintains a hole in a sidewalk in front of his premises in a populous city, over which is a movable trap-door, is answerable to a person who is injured by falling through such hole at a time when it was open and unguarded, though it is not shown by whom the door was removed, and the hole left open and unguarded: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55. Compare *City Council of Montgomery v. Wright*, 72 Ala. 411; 47 Am. Rep. 422; *Brucker v. Town of Covington*, 69 Ind. 33; 35 Am. Rep. 202. But the landlord is not answerable if the hole was made by permission of the city, covered in a safe and substantial manner, and the injury arose through the act of a third person, whereby the stone supporting the cover of the hole was broken, of which act the landlord had no knowledge: *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672. A license to construct an opening in a sidewalk does not excuse the leaving of such opening uncovered and unguarded; and the tenant, not the landlord, is liable when the latter has safely and properly built a coal-vault under the sidewalk, with an opening to the surface, by permission of the municipality, and the former, while in the exclusive possession of the property, carelessly leaves the coal-hole open, whereby some one is injured; but the landlord is answerable where the opening in the

sidewalk is left unguarded by a janitor in his employ who has general charge of the premises: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE OF PEDESTRIANS.—Plaintiff is not guilty of contributory negligence, because, assuming a sidewalk in a populous city to be safe, she permitted her attention to be momentarily attracted in another direction, and was injured by falling into a hole in such sidewalk: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55; *Hussey v. Ryan*, 64 Md. 426; 54 Am. Rep. 772. A pedestrian in a city is not necessarily guilty of contributory negligence in walking on a sidewalk which he knows to be unsafe, in a dark night, as the nearest way to his destination, instead of taking another way which was also unsafe: *City of Altoona v. Lotz*, 114 Pa. St. 238; 60 Am. Rep. 346. A person using a highway is not bound to anticipate danger without some notice of a condition of things suggesting a peril of travel: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453. A city is not liable to one who sustains an injury by reason of a defective sidewalk, if the latter could have avoided the injury by looking, and he showed no excuse for not looking: *City of Plymouth v. Milner*, 117 Ind. 324.

PEDESTRIANS, WHAT CARE REQUIRED OF.—A person takes risk upon himself who, seeing an obstruction in a street or sidewalk, and cognizant of its dangerous character, deliberately goes into or upon it, when he was under no compulsion to do so, and might have avoided it, and he is guilty of contributory negligence which will bar a recovery for an injury sustained by him under such circumstances: *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164. A person using the streets in a city must exercise reasonable and ordinary care; and while he may assume that they are safe, he must himself be free from negligence, and must not knowingly rush into danger, even if the city has been in fault, or the defect has been caused by the wrongful act of an independent contractor: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

WHAT IS SUFFICIENT NOTICE OF DEFECTS IN STREETS: See *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and note 459. When defects could have been discovered with ordinary care and prudence, the municipality is chargeable with notice thereof: *City of Atlanta v. Buchanan*, 76 Ga. 585.

DEFECTIVE SIDEWALKS.—A city is not absolved from its duty of keeping its streets in a safe condition because it has employed a contractor to do work thereon, and the streets become unsafe through his neglect, nor because it has not accepted his work: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453.

NEGLECTANCE—PROXIMATE CAUSE.—Contributory negligence, to bar recovery, must be the proximate cause of the injury: *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 521; *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374; *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604.

FOURTH NATIONAL BANK'S APPEAL.

[123 PENNSYLVANIA STATE, 473.]

NEGOTIABLE INSTRUMENTS — RIGHTS OF HOLDERS OF NOTES SECURED BY MORTGAGE. — As a general rule, when the holder of a number of promissory notes secured by mortgage parts with some of them, retaining the rest, and the sum realized from a sale of the mortgaged premises proves insufficient to pay the notes in full, distribution must be made *pro rata* among all the holders; but if the original holder transfers a part of the notes by indorsement for value, he thereby becomes a surety to the indorsees, and if he afterwards becomes insolvent, neither he nor his assignee for the benefit of creditors can receive payment out of the proceeds of the sale of the mortgaged premises until the holders of the notes so transferred are paid in full.

APPEAL of the Fourth National Bank of New York, and Henry Warner, assignee of the Penn Bank, from a final decree of distribution by the court below, awarding the whole of a fund to the payment of the claims of certain creditors of William Holmes. The said William Holmes, of the firm of Holmes, Lafferty, & Co., executed a mortgage to the Penn Bank to secure the payment of certain negotiable notes issued by said firm and discounted by said bank. The Penn Bank indorsed some of these notes for value before maturity, and afterwards, May 26, 1884, made an assignment for the benefit of its creditors to Henry Warner; the indorsed notes at the time being held as set out in the opinion. In August, 1884, Holmes, Lafferty, & Co., both as a firm and as individuals, also made an assignment for the benefit of their creditors, and subsequently their assignees sold the real estate covered by the said mortgage executed by William Holmes. Other facts appear in the opinion.

Thomas C. Lazear, S. A. McClung, Charles P. Orr, and A. M. Brown, for the appellants.

James H. Reed, James F. Robb, and Phil. C. Knox, for the appellees.

PAXSON, J. It was decided in *Donley v. Hays*, 17 Serg. & R. 400, that where a number of bonds are secured by a mortgage, and the holder of said bonds had parted with a portion of them, retaining some himself, and the sum realized by a sale of the mortgaged premises was insufficient to pay them all in full, distribution must be made *pro rata*. This principle has been recognized and followed in a number of cases. It is sufficient to mention *Mohler's Appeal*, 5 Pa. St. 418; 47

Am. Dec. 413; *Perry's Appeal*, 22 Pa. St. 43; 60 Am. Dec. 63; *Hancock's Appeal*, 34 Pa. St. 155; *Hodge's Appeal*, 84 Id. 359. If there were nothing else in this case, we would be constrained to reverse the court below, and adopt the views of the master. But there is a principle involved which did not enter into any of the cases cited. The Penn Bank was indorser upon each of the notes issued by Holmes, Lafferty, & Co., and which were secured by the mortgage in question. When, therefore, the Penn Bank negotiated these notes with its indorsement thereon, it occupied the position of surety to the holders.

The German National Bank of Allegheny is the holder for value of fifteen thousand dollars of these notes; Thomas Hare, agent, is also the holder for value of fifteen thousand dollars more of said notes. Together they amount to more than the fund for distribution. The American Exchange National Bank held the remaining three of said notes, amounting to twenty thousand dollars, as collateral security for an indebtedness of the Penn Bank. The indebtedness of the latter to the American Exchange National Bank has been fully paid out of other securities held by the latter, and the notes would have been returned to the Penn Bank but for the fact that, just prior to the assignment by the latter to Henry Warner for the benefit of its creditors, an attachment was issued in New York by the Fourth National Bank of that city, appellant, and served upon the American Exchange National Bank as garnishee of the Penn Bank. This attachment is pending in the court of errors and appeals of New York, and we cannot speculate as to its result.

Such an attachment would be worthless in this state, for the well-settled rule is, that the debt must be attached in the hands of the debtor; the mere evidence of the debt not being the subject of attachment. In any event, I do not see how the attachment in New York can possibly result in more than the transfer of the notes in question from the garnishee bank to the attaching bank, in which case the equities of the latter would rise no higher than the equities of the Penn Bank. The equities of the American Exchange Bank would not pass to the Fourth National by operation of law or the mere transfer of the notes, for the reason, amongst others, that the Penn Bank has paid the former bank in full, and as it is no longer a creditor it has no equities. Under such circumstances the Fourth National would stand in the shoes of the Penn Bank, so that this case must be disposed of precisely as if that bank

was the owner of the twenty thousand dollars of notes in question. The fact that it is now represented by its assignee for creditors does not alter the position in any degree. We have said so often that the assignee is but the representative of the assignor, standing in his shoes, enjoying his rights only, that we are almost weary of repeating it. Yet it seems as necessary to say it now as it ever was. I will refer only to two of the numerous cases that might be cited upon this point: *Wright v. Wigton*, 84 Pa. St. 163; *Morris's Appeal*, 88 Id. 368.

We come now to the question, What is the position of the Penn Bank as a claimant upon this fund? If it had not become surety on the notes held by the German National Bank and Thomas Hare, agent, it would be clear, under *Donley v. Hays*, *supra*, and the other cases cited, that the fund would have to be distributed *pro rata* among all the holders of the notes, including the Penn Bank. But that it is such surety is a vital fact in the case. There was no question of a surety or a guaranty in *Donley v. Hays*, *supra*, or the other cases referred to. Yet in *Mohler's Appeal* and in *Hancock's Appeal*, *supra*, the fact that a guaranty of the bonds by the party selling them might affect his rights as a claimant upon a portion of them was clearly foreshadowed. The principle adopted by the auditor that "equality is equity" is very well in its place, but it is not always adopted in distributing a fund among creditors. Such distributions are made upon equitable principles. Thus it sometimes happens that a creditor who has a first lien is not entitled to take the fund. It was ruled in *Himes v. Barnitz*, 8 Watts, 39, that "in the appropriation of the proceeds of a sheriff's sale, though a party claimant had a prior judgment, yet, if insolvent, he shall not take the money raised to the prejudice of another subsequent judgment creditor to whom he is bound as surety for the payment of his judgment." Why, then, should the insolvent Penn Bank, which stands as surety on the appellee's notes, take the fund which in equity and good conscience should go to the holders of those notes?

Worrall's Appeal, 41 Pa. St. 524, is directly in point. The *syllabus* of that case, which embodies the principle decided, reads: "Though a claimant to the proceeds of a sheriff's sale of the personal property of his debtor has the prior execution, he cannot by virtue thereof, if insolvent, receive the fund to the prejudice of a subsequent execution creditor, for whose claim he was bound as the surety of the debtor, but the proceeds

will be appropriated to the latter claimant." It was said by Justice Woodward, in delivering the opinion of the court, that it would be inequitable to permit a joint debtor who is insolvent to divert a fund from a creditor to whom he owes it into his own irresponsible pocket. It is true, upon the face of the papers, the Penn Bank is entitled to a *pro rata* share of the fund in question. But it is equally bound to the appellees upon its indorsements. Equity would require that the Penn Bank should hand over its share of the notes, as soon as received, to the appellees, for whom it is surety. Equity will apply it, as it would be the duty of the Penn Bank to apply it, by handing it over directly to the appellees.

The decree is affirmed, and the appeals dismissed, at the costs of the respective appellants.

MORTGAGE. — ASSIGNMENT OF A PORTION OF A MORTGAGE DEBT carries with it, in equity, a corresponding interest in the mortgage security; as where a coupon of a bond secured by a mortgage is assigned when payable, and the coupon holder, in a foreclosure of the mortgage, is entitled to a *pro rata* distribution with the holders of the residue of the mortgage debt: *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399; 94 Am. Dec. 414. A mortgage secures a debt, and no change in the form of the evidence of the debt, and nothing short of actual payment, or an express release of the debt secured, will release the mortgage; and a transfer of the debt carries with it, without assignment or delivery, the security: *Stimpson v. Bishop*, 82 Va. 190.

MARLAND v. PITTSBURGH AND LAKE ERIE RAILROAD COMPANY.

[123 PENNSYLVANIA STATE, 487.]

RAILROAD COMPANY — NEGLIGENCE. — One who attempts to cross railroad track in front of approaching train, which he must have seen had he used his eyesight, and is struck and injured, is guilty of such contributory negligence as will defeat any recovery by him in an action against the railroad company.

ACTION to recover damages for personal injuries sustained by the plaintiff, and alleged to have been caused by the negligence of the defendant. The material facts appear in the opinion. At the close of the plaintiff's testimony, the defendant moved that a judgment of compulsory nonsuit be entered, and the motion was allowed. The plaintiff assigned error.

Clarence Burleigh and S. A. McClung, for the plaintiffs in error.

James H. Reed and Phil. C. Knox, for the defendant in error.

GREEN, J. On the trial of this case, the plaintiff testified that he stepped upon the track, and was instantly struck and injured. It is true, he said he looked up and down the track, and saw nothing; but it is necessarily true, also, that if he made use of his eyesight, he must have seen the approaching train. He could not possibly look along the track in the direction of the approaching train and fail to see it, since his presence on the track and the collision were simultaneous. We have pronounced emphatically upon such facts in several of our recent cases.

In *Carroll v. Pennsylvania R. R. Co.*, 12 Week. Not. 348, we said: "The injury received by the plaintiff was attributable solely to his own gross carelessness. It is in vain to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive." The same doctrine was applied in the case of *Moore v. Philadelphia etc. R. R. Co.*, 108 Pa. St. 349. There the plaintiff stood between two tracks waiting for a train to pass. He testified that he looked up and down the road and saw no train, but nevertheless he was struck by an approaching engine, and we held he could not recover. In the very late case of *Pennsylvania R. R. Co. v. Bell*, 122 Id. 58, we reversed the judgment because the court below did not direct a verdict for the defendant upon entirely similar facts, and for the same reason. There, also, the plaintiff's witness testified that he looked for the train, but that the deceased was struck the moment they saw the head-light, and we held that the deceased had voluntarily placed himself so close to the rails that he was struck by the engine, and therefore there could be no recovery.

In the present case, the facts are still more damaging to the plaintiff, because he attempted to cross the track immediately in front of the train, which he could not possibly have looked for without seeing. It was about half-past five o'clock upon an afternoon in February. There was no evidence that it was dark, and the plaintiff's principal witness testified that he saw the plaintiff falling from a point almost a hundred feet distant. The attempt to cross the track in front of an approaching train so close that the plaintiff was instantly struck was an act of gross carelessness on his part, contributing directly to his injury, and this precludes any recovery.

Judgment affirmed.

RAILWAYS — CONTRIBUTORY NEGLIGENCE. — One who stands upon or crosses a railroad track, in full view of an approaching engine, which rings its bell and blows its whistle, without using his senses to guard against the danger to which he is exposed, being absorbed in an effort to board a moving train, is guilty of such contributory negligence as will bar a recovery: *Weeks v. New Orleans etc. R. R. Co.*, 40 La. Ann. 800; 8 Am. St. Rep. 560, and note 565. A railroad track is of itself a warning of danger to all persons who go upon it, and one who is about to go upon it must look and listen, if by so he can discover the proximity of a moving train, and the omission to do so is an omission of ordinary care, and such contributory negligence on his part as will prevent a recovery for an injury which he might have avoided if he had made use of his faculties of sight and hearing: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note 813, 814.

NIAGARA FIRE INSURANCE COMPANY v FIDELITY TITLE AND TRUST COMPANY.

[123 PENNSYLVANIA STATE, 516.]

INSURANCE — SUBROGATION. — It is good defense to action against insurance company brought on a policy of fire insurance which provides that when the company should claim that the fire was caused by the wrongful act or omission of another creating a cause of action, the party to whom the loss was payable under the policy should, on receiving payment, assign such cause of action to the company, if it be shown by the defendant that subrogation had been demanded, and that payment of the loss had been offered upon receiving an assignment of the cause of action against the wrong-doer whose negligence was alleged to have caused the loss; also, that the plaintiff had refused to make and deliver such assignment, and had, in disregard of the covenant in the policy, settled with such wrong-doer, giving a release from liability, such release not to affect, however, the claim of the plaintiff against the insurance company for loss. By the terms of the policy, the act of payment on the one hand, and of assignment on the other, are made concurrent, and the covenants being dependent, performance by one of the parties cannot be compelled without performance, or an offer to perform, by the other.

ACTION on a policy of fire insurance, brought by the Fidelity Title and Trust Company of Pittsburgh, trustee, for the use of the Western University of Pennsylvania, against the Niagara Fire Insurance Company of New York. Judgment for want of a sufficient affidavit of defense was entered in favor of the plaintiff, and the defendant assigned error.

Isaac S. Van Voorhis, for the plaintiff in error.

George P. Hamilton, for the defendant in error.

WILLIAMS, J. When the judgment was entered in this case, a copy of the policy of insurance sued on and an affidavit of

defense were on file. The question in the court below, and now before us, is, whether the affidavit disclosed a good defense to the action on the policy. The following provision made part of the contract between the parties: "When this company shall claim that the fire was caused by an act or omission of any person, town, or corporation which created a cause of action, the party to whom the loss is payable under this policy shall, on receiving payment, assign to this company such cause of action." The affidavit of defense distinctly averred that subrogation had been demanded, and that payment of the loss had been offered upon receiving an assignment of the cause of action against the gas company; also, that the plaintiff had refused to make and deliver such assignment, and had, in disregard of the covenant in the policy, settled with the gas company, whose negligence was alleged to have caused the injury, and released it from liability. The facts thus averred, if sufficiently proved, constitute a good defense, and for the purpose of determining the sufficiency of the affidavit, they are to be taken as true.

By the terms of the policy it is expressly provided that the assignment shall be made "on receiving payment." The act of payment on the one hand, and of assignment on the other, are thus made concurrent. The covenants are dependent, and performance by one of the parties cannot be compelled without performance, or an offer to perform, by the other: *Williams v. Bentley*, 27 Pa. St. 294; *Henry v. Raiman*, 25 Id. 354; 64 Am. Dec. 703; *Keeler v. Schmertz*, 46 Pa. St. 135; *Adams v. Williams*, 2 Watts & S. 227. There is no question of tender involved, and the authorities cited upon that question are therefore inapplicable. The plaintiff sues upon a policy insuring against loss by fire. The defendant admits the loss, avers the covenant to assign "on receiving payment," and alleges an offer to perform on its part, on or concurrently with performance by the plaintiff, which was refused, and its right to such assignment denied. This is a complete answer to the action. The plaintiff cannot compel performance by the insurance company while refusing performance of its own covenant with which that of the insurance company is connected and upon which it is dependent.

The effect of the release given by the plaintiff to the gas company is not now before us; but its purpose to save the rights of the plaintiff against the insurance company would seem clear from the language employed. "It is understood that

the foregoing settlement and release do not affect the claim of said first party against insurance companies for loss occasioned by fire, and which claim said first party shall be entitled to receive in addition to and independently of the sum paid by said second party." The gas company has not, therefore, paid for the loss by fire, and the release expressly excepts this part of the plaintiff's claim from its operation, in order to save the plaintiff's cause of action against the insurance companies. If, however, the release did extinguish all claim for damages by fire resulting from the explosion, that alone would be a sufficient reason for refusing judgment in this case under the rule laid down in *Carstairs v. Mechanics' and Traders' Ins. Co.*, 18 Fed. Rep. 473. Such a release as should make performance of the covenant to assign either impossible or useless would relieve the insurance company from its concurrent covenant to pay.

The judgment is now reversed, the record remitted, and a *procedendo* awarded.

INSURANCE — LOSS OCCASIONED BY A WRONG-DOER — SUBROGATION. —

Where the plaintiff insured his buildings, worth thirty-four hundred dollars, for fifteen hundred dollars, and such buildings were afterwards destroyed by fire through defendants' negligence, and defendants paid M. eighteen hundred dollars for the loss, and took a release therefor containing a provision that it was not to discharge plaintiff from M.'s claim against it, and the plaintiff afterwards paid M. the amount of insurance, in an action to recover the amount so paid, the provision in the release was designed and would have had the effect to prevent the plaintiff from interposing the release as a defense to an action on the policy, and therefore the plaintiff's right of subrogation was not affected by it, and the action was maintainable: *Connecticut Fire Ins. Co. v. Erie R'y Co.*, 73 N. Y. 399; 29 Am. Rep. 171.

COVENANTS BY INSURER FOR PAYMENT OF LOSS existing contemporaneously with covenants by the assured to assign the cause of action against the third party, who is the wrong-doer, being dependent covenants, unless there was a performance, or an offer of performance, by one of the parties, no performance can be compelled as to the other party: *Williams v. Bentley*, 27 Pa. St. 294; *Henry v. Raiman*, 25 Id. 354; 64 Am. Dec. 703; *Keller v. Schmertz*, 46 Pa. St. 135.

INSURANCE COMPANY OF NORTH AMERICA v. FIDELITY TITLE AND TRUST COMPANY.

[123 PENNSYLVANIA STATE, 523.]

RIGHT TO SUBROGATION OR SUBSTITUTION, WHEN IT DOES NOT REST ON EXPRESS COVENANT, must depend upon equitable principles applicable to the relations which the parties sustain to each other.

SUBROGATION. — IT IS NOT LIABILITY TO PAY, BUT ACTUAL PAYMENT to the creditor which raises the equitable right to be subrogated to his remedies. A demand made by the surety for subrogation before he has discharged the liability out of which it grows is without anything to support it, and the creditor may properly refuse it without affecting thereby his right of action against the surety.

INSURANCE — SUBROGATION. — REFUSAL OF PARTY INSURED IN FIRE POLICY to make an assignment to the insurers of a cause of action against a wrong-doer through whose negligent act a loss occurred is no defense to an action on the policy, in the absence of an express covenant by the insured to assign.

INSURANCE — RELEASE BY INSURED OF CLAIM AGAINST WRONG-DOER WHOSE ACT CAUSED THE LOSS BY FIRE. — A party insured in a fire policy may settle with and release a gas company whose alleged negligent act caused the loss to the insured property from all claim for injuries not covered by the insurance, without prejudice to his right of recovery against the insurance company for the loss by fire.

ACTION by the Fidelity Title and Trust Company of Pittsburgh, trustee, for use of the Western University of Pennsylvania, against the Insurance Company of North America of Philadelphia.

Isaac S. Van Voorhis, for the plaintiff in error.

George P. Hamilton, for the defendant in error.

WILLIAMS, J. This is an action upon a policy of insurance against loss by fire in the usual form. Judgment was entered for want of a sufficient affidavit of defense, and this is the action complained of. The affidavit admits the genuineness of the policy, the fire, the loss as adjusted, and the liability of the insurance company under the terms of its policy, but denies the right of the plaintiff to recover, for the following reasons: 1. The fire resulted from the criminal negligence of the People's Natural Gas Company, which is therefore liable for the loss; 2. Its own liability to the insured is in the nature of that of a surety, and upon payment of the loss to the plaintiff it has a right to be substituted to its right of action against the gas company; 3. That it has demanded an assignment of such right of action, which has been refused; 4. That the in-

sured has settled with the gas company, and released it from liability for the fire, as appears by a copy of the settlement and release attached to the affidavit. Two questions are thus raised: Is the refusal of the insured to make an assignment of its cause of action against the gas company, on request of the insurer, a defense to this action on the policy? Does the settlement and release attached to the affidavit cover the loss by fire now sued for?

Upon the first of these questions it must be remembered that the right to subrogation or substitution does not rest on an express covenant to assign, as in the case of *Niagara F. Ins. Co. v. Fidelity Title and Trust Co.*, 123 Pa. St. 516. In the absence of such covenant, it must depend on equitable principles applicable to the relations which these parties sustain to each other. If it be conceded that the insurer stands in the position of a surety for loss sustained by reason of the wrongful acts of others, and has a right to the remedies which the insured might employ against them, after it has discharged its liability under its policy, still it has no reason for demanding substitution in advance. It is not a liability to pay, but an actual payment to the creditor which raises the equitable right to be subrogated to his remedies: *Kyner v. Kyner*, 6 Watts, 227; *Hoover v. Epler*, 52 Pa. St. 522; *Forest Oil Co.'s Appeal*, 118 Id. 138. A demand made by the surety for subrogation before he has discharged the liability out of which it grows, is without anything to support it, and the creditor may properly refuse it without affecting thereby his right of action against the surety. The refusal of the assignment demanded by the insurer in this case, in advance of payment of the loss, is therefore no defense to this action.

Nor does the settlement and release of December 30, 1887, appear to cover and so extinguish the plaintiff's cause of action. It is plain and explicit in its provisions, and purports to settle and release "all claims and demands of every kind of the said first party, arising out of or occasioned by the explosion in the Patterson Block on October 19, 1887, including claims for loss or suspension of rent by the tenants of said first party." These general expressions are limited and explained in a later paragraph, which declares that "it is understood that the foregoing settlement and release do not affect the claim of said first party against insurance companies for loss occasioned by fire, and which claim said first party shall be entitled to receive in addition to and independently of the sum

paid by said second party." From the terms of this settlement and release, it is evident that the loss by fire was not paid by the gas company, but was expressly excepted from its operations. The injury done by the destructive power of the explosion in shattering walls and windows, in the destruction of articles of furniture, and making rooms temporarily unfit for occupancy, is included, but the loss from fire is excluded from its operations, and the right to recover therefor, as an unsatisfied claim, valid and subsisting against the insurers, is distinctly asserted. If the fire resulted from the explosion, and the explosion was chargeable to the negligence of the gas company, the insured had an election whether to proceed against the gas company because of its negligence, or against the insurance company on its covenant to indemnify. If the insured had proceeded against the gas company, a recovery against it for the loss by fire would, when paid, have reimbursed the insured, and its claim being thus satisfied, no recovery could have been had against the insurance company. But the insured has chosen to divide its loss into two parts, and to demand one of these, not covered by its policies of insurance, from the gas company, and the other, which is covered, from the insurance company.

The liability of the insurer is clear. The claim is within the letter of its policy. Whether the gas company is liable to reimburse the insurer in an action brought in the name of the insured, for its use, will depend on whether the fire was the result of the criminal negligence of the gas company. This part of the demand of the insured has not been paid by the gas company, nor has it been extinguished by the terms of the release. On the other hand, it has been expressly saved from the operations of the release, and asserted to be a valid claim, "which said first party shall be entitled to receive in addition to and independently of the sum paid by said second party." After having thus asserted the existence of this claim as unpaid or subsisting, the gas company could not be heard, after a recovery against the insurance company, to deny its validity, or to assert its release or extinguishment. The right of action and demand released were those paid by the gas company. That not paid does not purport to be released, but is asserted to subsist. It has neither been disposed of by the parties nor by the law, but remains for adjudication in the same manner and with the same effect as though the release of December 30, 1887, had not been executed. The court below was right

in holding the affidavit to be insufficient, and in directing judgment to be entered for that reason.

The judgment is therefore affirmed.

SUBROGATION IS AN EQUITABLE RESULT PURELY, and depends on facts to develop its necessity, that justice may be done. Privity of contract is not necessary to support subrogation; it exists upon principles of mere equity and benevolence. The principle does not apply in favor of mere volunteers: *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; note to *Rowlett v. Grieve's Syndics*, 13 Am. Dec. 297. Subrogation as a matter of course, without any agreement to that effect, arises only in what cases: *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773. Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable who has paid a debt to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may thus be made whole: *Forest Oil Co.'s Appeal*, 118 Pa. St. 138; 4 Am. St. Rep. 584, and note; *Fears v. Albea*, 69 Tex. 437; 5 Am. St. Rep. 78, and note 85.

COMPARE THIS CASE with the case of *Niagara F. Ins. Co. v. Fidelity T. & T. Co.*, 123 Pa. St. 516; *ante*, p. 543; from which it is distinguished, though in some respects analogous.

WALL v. WALL.

[123 PENNSYLVANIA STATE, 545.]

JUDGMENTS. — GENERAL PROPOSITION THAT DECREE OF PROBATE BY REGISTER OF WILLS IS JUDICIAL DECREE, and after the lapse of five years unappealed from, is conclusive as to the real estate devised, must be understood as qualified by the same conditions that qualify the conclusiveness of judgments at law.

JUDGMENTS. — WANT OF JURISDICTION, either of person or subject-matter, appearing upon face of record, can be taken advantage of at any time and in any court where the conclusiveness of the judgment or decree is the subject of judicial inquiry.

JUDGMENTS. — JURISDICTION OF REGISTER OF WILLS IS CONFERRED BY STATUTE, and within the limitations prescribed his decrees are conclusive, but outside of such limitations he is without authority to make a decree, and his decree, if made, is a nullity.

JURISDICTION. — WHERE REGISTER OF WILLS HAS JURISDICTION, decree regular in form will be aided by the presumption that all things necessary to be done have been rightly done. But jurisdiction will not be presumed when the record shows the want of it.

WILLS. — TESTAMENTARY PAPER WHICH DOES NOT MEET REQUIREMENTS of Pennsylvania wills act of 1833 is not a will, and the register cannot make it one by admitting it to probate.

WILLS — INVALIDITY OF DECREE ADMITTING WILL TO PROBATE. — When the record of probate shows that the testamentary writing presented to the register for probate was not signed by the alleged testator, and that the failure to sign was not accounted for, as required by the Pennsylvania wills act of 1833, in order to entitle the writing to probate, in such case, the register was without jurisdiction, and his decree admitting the paper to probate as a will was an absolute nullity.

ACTION of ejectment brought by Isaac Wall against Uriah Wall to recover a certain tract of land. The plaintiff claimed title through and under the alleged will of Isaac Wall, his grandfather, deceased, and offered the instrument in evidence. It had been admitted to probate, and though more than five years had elapsed, was unappealed from; and two affidavits accompanying the instrument showed that before it was finally drawn up for the signature of the testator he died. The instrument was admitted in evidence, against the defendant's objections, and the jury found a verdict for the plaintiff. Judgment having been entered thereon, the defendant assigned error.

George C. Wilson, for the plaintiff in error.

Homer H. Swaney and W. C. Erskine, for the defendant in error.

WILLIAMS, J. The general rule on which the court below rested its ruling in this case is well settled. A decree of probate made by the register of wills is a judicial decree, and after the lapse of five years without appeal, it is conclusive as to the real estate disposed of by it. This rule has been recognized and applied in many cases, among which are *Holliday v. Ward*, 19 Pa. St. 485; 57 Am. Dec. 671; *Cochran v. Young*, 104 Pa. St. 333; *McCay v. Clayton*, 119 Id. 133.

But the general proposition thus affirmed must be understood as qualified by the same considerations that qualify the conclusiveness of judgments at law. Of these, the most obvious is that which relates to the jurisdiction of the court over the subject-matter and the persons affected by the judgment. If the court has no jurisdiction, it is of no consequence that the proceedings have been formally conducted, for they are *coram non judice*. A judgment rendered by a justice of the peace in a cause over which he has no jurisdiction is void, notwithstanding service may have been regularly made on the defendant, and he may have failed to appeal or take a *certiorari* within the time prescribed by law. A judgment rendered in the court of quarter sessions, in a proceeding exclusively within the jurisdiction of the common pleas, and *vice versa*, is void for want of jurisdiction in the court rendering the judgment. So although the court may have jurisdiction of the subject-matter, yet if there be no service, actual or constructive, on the defendant, the judgment is void for want of jurisdiction over the person to be affected. If such want of

jurisdiction appear upon the record, it can be taken advantage of at any time and in any court where the conclusiveness of the judgment is the subject of judicial inquiry. The reason for this is found in the fact that the record of the judgment bears on its face the proof of its illegality, and shows the want of power in the tribunal to render it. When it is offered as a conclusive adjudication between the parties, an inspection shows that it is not, because the court had no power to make an adjudication.

In the case now under consideration, the jurisdiction of the register is conferred by statute, and the limitations within which it is to be exercised are very plainly prescribed. Within these limits his decrees are conclusive. Outside of them he is without any authority to make a decree, and his decree if made is a nullity.

The act of 1833 provides that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise said will shall be of no effect." A writing that does not meet these requirements is not a will, and the register cannot make a will out of it. If a deed in the usual form should be presented to the register as the will of the grantor, and proof should be made by two witnesses showing its execution and delivery as a deed, a decree of probate resting on such an instrument, and such proofs spread upon the record, could not change the character of the instrument, or conclude any one interested. This was substantially ruled in *Bowlby v. Thunder*, 105 Pa. St. 173. The action in that case, as in this, was ejectment. The register had probated two papers which were attached to a formal will as though they had been part of it. There had been no appeal from the decree, and more than five years had elapsed. The party claiming under the will alleged that the decree of probate was conclusive as to the testamentary character of the attached papers. The court below, however, held otherwise, and this court affirmed its action, giving as a reason that "probating does not make a will." The ground on which the decision in *Bowlby v. Thunder*, *supra*, stands is, that the register had no jurisdiction over the writings attached to the will. They were precatory or advisory, and were for the guidance of the executor. Their

character and his want of jurisdiction were apparent on the face of his record, and his decree was an absolute nullity.

The case at bar is still stronger. Isaac Wall, realizing the dangerous character of his sickness, desired to make a will, and gave directions to a scrivener for its preparation. Before the writing was ready for his examination he died. He never saw the will which had been prepared for him, nor knew its contents. It was presented to the register for probate in the same condition in which it left the hands of the scrivener, an unexecuted writing. This was enough to prevent its probate until the want of execution was accounted for in accordance with the act of 1833. The proofs produced, instead of showing that the paper was approved by the testator, but its execution prevented by the extremity of his last sickness, showed very clearly that he had not examined it, and could not have intended its execution, because he was dead when it was finished. The register was therefore without jurisdiction. The writing produced was not signed, nor was the failure to sign accounted for, as the act of 1833 required, in order to entitle the writing to probate.

In *Aurand v. Wilt*, 9 Pa. St. 54, the action was ejectment, and the validity of the will of Peters was the controlling question. He was living when his will was written and brought to him, but he was unable to comprehend what was said about it, and died without executing it. It was held that the will was not entitled to probate, and Rogers, J., delivering the opinion of this court, said: "An opportunity must be given to have the will read and explained to him [the testator], which cannot be if before it is completed and ready for signing he becomes incapable of understanding and comprehending the contents. If at the time or before it is completed he either dies or ceases to be able to act understandingly, it cannot be admitted to probate."

Several cases have been cited which are thought to hold a different doctrine, but an examination will show that they do not. They are cases in which a will purporting to be signed by the testator was presented for probate. The fact that the will was executed gave the register jurisdiction to inquire into the manner of its execution, and the mental condition of the testator. Where he has jurisdiction, a decree regular in form will be aided by the presumption that all things necessary to be done have been rightly done. Presumptions may be resorted to in aid of a decree otherwise regular. But jurisdic-

tion will not be presumed when the record shows the want of it. In such case the decree is a nullity.

Judgment reversed, and a *venire facias de novo* awarded.

JUDGMENTS VOID FOR WANT OF JURISDICTION may be set aside after the lapse of twelve years: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448; a void judgment may be vacated by the court which rendered it at any time, and this is true, notwithstanding the lapse of time: *Olney v. Harvey*, 50 Ill. 453; 99 Am. Dec. 532, and note citing other cases.

WASHINGTON NATURAL GAS CO. v. JOHNSON.

[123 PENNSYLVANIA STATE, 576.]

LANDLORD AND TENANT — ASSIGNMENT OF LEASE. — Lessee continues liable on his covenants in lease, notwithstanding his assignment of it, because of the continuance of his privity of contract with the lessor. An assignee of the lease is fixed with notice of its covenants, and takes the estate of his assignor *cum onere*, but as his liability grows out of privity of estate only with the lessor, it ceases when the privity ceases.

LANDLORD AND TENANT. — EACH SUCCESSIVE ASSIGNEE OF LEASE, because of privity of estate, is liable upon covenants maturing and broken while the title is held by him, but is not liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor.

LANDLORD AND TENANT. — ASSIGNEE OF OIL AND GAS LEASE is not liable to lessor upon a covenant of the lessee to sink a well upon the leased premises, the time fixed in the lease for sinking the well having passed by before the acquirement by the assignee of title under the assignment.

PAYMENT. — PARTY PAYING MONEY HAS RIGHT TO DIRECT ITS APPROPRIATION, and where, pending the adjustment of a disputed liability, the debtor sends his creditor money as a payment in full of the demand, it is the duty of the creditor to accept the money for the purpose for which it was offered, or to return it, and his refusal to return it will be deemed an election to accept it for the purpose offered.

ACTION of *assumpsit*. The facts appear in the opinion. Judgment having been entered upon a verdict in favor of the plaintiffs, the defendant assigned error.

Gibson D. Packer and J. I. Brownson, Jr., for the plaintiff in error.

R. W. Irwin, L. McCarrell, E. E. Crumrine, and Boyd Crumrine, for the defendants in error.

WILLIAMS, J. This action is brought to recover for a breach of covenant contained in an oil lease dated August 5, 1885. By the terms of the lease Guffey & Co., the lessees, acquired the exclusive right to drill and operate wells for oil and gas

on about seventy-five acres of land for the term of twenty years. In consideration of this grant they undertook to commence operations on the premises, and complete one well within six months from the date of the lease. They were also to commence a second well four months after the time for the completion of well No. 1. The royalty to be paid was fixed by the terms of the lease at one fourth of all oil produced if oil was found, and eight hundred dollars per annum for each gas well operated, if gas was found in sufficient quantities to be utilized. The lessees took possession, and drilled one well in accordance with their covenant, which produced gas in sufficient quantities to be utilized. Three months before the time for putting down the second well, Guffey & Co. assigned the lease to C. D. Robbins, who held it from March 18, 1886, till January 20, 1887, and then assigned to the Washington Natural Gas Company. The second well should have been drilled, allowing three months to be a reasonable time in which to complete it, during the time when Robbins was the holder of the lease. The action, however, is against the assignee of Robbins, whose title was acquired some two months after the time when the well should have been completed, and at least five months after it should have been begun.

The liability of the assignee was brought to the attention of the court by the sixth point submitted on the part of the defendant below, as follows: "It being a conceded fact that a reasonable time for drilling said second well had elapsed before defendant became assignee of the lease, the defendant cannot be held liable for a failure to drill said well." This point was refused. The seventh point asked the further instruction that "it being shown by the plaintiffs themselves that the covenant in the lease to commence the second well was broken before the defendant acquired any interest in the lease, the proper remedy for such breach was an action against the original lessee, or the holders of the lease at the time of the breach." This was also refused; and the learned judge told the jury in his general charge that the breach of the covenant to drill a second well was not complete until the end of sixty days after the well should have been finished, because that was the time when the rent for the second well would fall due. "The commencement of the breach," said the learned judge to the jury, "was the failure to begin a second well on or before October, 1886, and the consummation

was in not paying the eight hundred dollars when it ought to have been paid had a paying well been struck." The answers to the points and the foregoing instruction are assigned for error.

The covenant sued on is as follows: "And it is further agreed the second well shall be commenced four months after May, 1886, the time stated for the completion of well No. 1." The plaintiffs allege a breach of this covenant, and state their cause of action to be that the defendant "has failed to commence a second well upon said leased premises within the time mentioned in said lease, to wit, within four months from May 1, 1886, or at any other time." The instruction of the learned judge that a covenant to commence a well at a fixed time was only partly broken by a failure to commence it is not in harmony with the plaintiffs' claim as stated in their *narr.*, nor is it justified by the terms of the covenant. If the well had been drilled at the proper time, the covenant would have been fully performed, though neither gas nor oil had been found, and in that event no rent would have been demandable. The duty to pay rent for the second well, as for the first one, was conditioned upon actual production, and it ceased when the production ceased, or when the quantity of gas was too small to be utilized. The object of the covenant was to secure the development of the lessor's land by the putting down of two wells upon it, for which rent was to be paid if the wells were successful. The breach was complete when the lessee failed to drill as he had agreed. Loss of rents and profits might or might not follow, depending on the productiveness of the field. This subject might have been considered by the jury in fixing the damages after the plaintiffs' right to recover was settled, but had no relation whatever to the question on which the liability of the defendant depended.

Turning, then, to the question raised by the points, we find the facts to be as assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffey & Co. ran with the land. That they continued liable, notwithstanding their assignment to Robbins, is very clear. The covenant was their own, and their privity of contract with their lessors continued, notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable, because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate

by an assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity of estate, and so on *toties quoties*. Each successive assignee would be liable for covenants maturing while the title was held by him, because of privity of estate; but he would not be liable for those previously broken or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits he bears its burdens; but he lays down both the estate and its burdens by an assignment, even though, as is said in some of the cases, his assignment be to a beggar: *Negley v. Morgan*, 46 Pa. St. 281; *Borland's Appeal*, 66 Id. 470.

It is clear, therefore, that when Robbins made his assignment to the Washington Natural Gas Company, the time fixed in the lease for the sinking of the second well had gone by, and the covenant was broken. Guffey & Co. were liable upon their contract, because although their assignment had divested them of the lease, it could not relieve them from their contracts. Robbins, who was the owner when the covenant matured, was liable, because of the privity of estate; but the gas company had no relations with the lessor or the leasehold until after the covenant was broken. The covenant ran with the land until the breach. It then ceased to run, because it was turned into a cause of action.

The case of *Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 57 Am. Rep. 442, has been cited as sustaining a contrary doctrine, but an examination of it will show that it is clearly distinguishable from this case.

The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to "continue with due diligence and without delay to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption." Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of

the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and "without interruption." The obligation of a covenant to prosecute the business of developing the land of the lessor without delay and without interruption is a continuing one. The breach for which the Bradford Oil Company was held liable was not that of some previous holder of the title, but its owner.

There is another reason for reversing this case, brought to our attention by the eighth assignment of error. The check for \$650 sent by the treasurer of the gas company to the attorney of the lessors was expressly stated to be in full for the Johnson lease from May 1, 1887, to May 1, 1888. A receipt was returned for the amount, stating that it was received for rental of well No. 1, on Johnson lease. The treasurer promptly returned the receipt, saying: "The \$650 was sent, and so stated, in full for Johnson lease"; and requesting its return if not accepted as sent. It was not returned. The party paying money has the right to direct its appropriation. It was the plain duty of the lessor to accept the check for the purpose for which it was offered, or to return it. Attention was again drawn to the subject by the treasurer in a note dated July 21st, asking the return of the check unless accepted as in full payment of all rents due on the lease. The refusal to return it after this explicit direction ought to be regarded as an election to accept it for the purpose for which it was offered, viz., as payment in full for all rents due upon the lease.

Judgment reversed.

ASSIGNMENT OF LEASES, AND THE RESPECTIVE RIGHTS AND LIABILITIES OF LESSOR, ASSIGNEE, AND ASSIGNOR THEREAFTER. — *Assignable Quality of Leases in General.* — A lease for years is, in law, considered a chattel real: *Osborne v. Humphrey*, 7 Conn. 335; *Calbreth v. Smith*, 69 Md. 450; *Ex parte Gay*, 5 Mass. 419. It is an interest in the land which is capable of being sold and transferred: *Clarkson v. Skidmore*, 46 N. Y. 297, 305; and ejectment lies to recover the possession of the land demised: *Olendorf v. Cook*, 1 Lans. 37. Unless restrained by some stipulation in his lease, the tenant for years may assign over his entire interest to some third person, whether the term is in possession or is to commence *in futuro*: *Robinson v. Perry*, 21 Ga. 138; 68 Am. Dec. 455; *Garner v. Byard*, 23 Ga. 289; 68 Am. Dec. 527; *Perrin v. Lepper*, 34 Mich. 292; *Becar v. Flues*, 64 N. Y. 520. The power to assign is incident to the estate of the lessee, and exists without the word "assigns" in the lease, when not expressly restricted: *Greenaway v. Adams*, 12 Ves. 395; *Cooney v. Hayes*, 40 Vt. 478; 94 Am. Dec. 425. And stipulations in leases against assignment or underletting will be construed by the courts liberally in favor of the lessee: *Boyd v. Fraternity Hall Ass'n*, 16 Ill.

App. 574; *Doe v. Carter*, 8 Term Rep. 61. And where the lessee covenants that he or others having his estate in the premises will not assign the lease without the written consent of the lessor, this does not by its true construction extend so far as to prohibit a reassignment to the lessee himself without a new and special consent of the lessor. By the lease, the lessor consents to take the lessee as his tenant for the full term mentioned in the lease, and this consent is available for any reassignment to the original lessee during the term: *McCormick v. Stowell*, 138 Mass. 431; moreover, breach of a condition against assigning a lease without the assent of the lessor does not make the lease void, but voidable only: *Chautauqua Assembly v. Alling*, 46 Hun, 582; *Webster v. Nichols*, 104 Ill. 160; but a tenancy at will is not assignable: *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814; *Whittemore v. Gibbs*, 24 N. H. 484; *King v. Lawson*, 98 Mass. 309. So a distinction is made between an assignment of a lease and a sublease. An assignment is where the lessee transfers the whole interest of his lease to another without retaining any reversionary interest. An underletting or sublease is where the lessee sublets the premises, retaining a reversion in himself: *Hicks v. Martin*, 25 Mo. App. 359. In other words, if a lessee by any instrument whatever, whether reserving conditions or not, parts with his entire interest, he has made a complete assignment; if he has transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*. But if he retains a reversion in himself, he has made a sublease: *Bedford v. Terhune*, 30 N. Y. 453, 457; 86 Am. Dec. 394; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Doty v. Heith*, 52 Miss. 530; *McNeil v. Kendall*, 128 Mass. 245; 35 Am. Rep. 373; *Dunlap v. Bullard*, 131 Mass. 161; *Collamer v. Kelly*, 12 Iowa, 319; *Post v. Kearney*, 2 N. Y. 394; 51 Am. Dec. 303, and note 306. An assignment of a lease may take place by operation of law as well as by voluntary act of the parties. Thus a purchaser at a sale on execution of a leasehold estate stands in the position of an assignee in law of such estate, with substantially the same rights as if it had been voluntarily assigned to him by the lessee: *McNeil v. Ames*, 120 Mass. 481; and see *Borland's Appeal*, 66 Pa. St. 470; *Martin v. Tobin*, 123 Mass. 85. So a conveyance of leased premises by the lessee to one having notice of the lease operates merely as an assignment of the term, and if the assignee goes into possession he will be liable to the lessor for the rent reserved in the lease: *De Pere Co. v. Reynen*, 65 Wis. 271. So when the lessor grants his reversion the lease passes, and he has no more interest or concern in it than the payee of a promissory note after he has indorsed it to another: *Lancashire v. Mason*, 75 N. C. 455; and see *Dixon v. Niccolls*, 39 Ill. 372; 89 Am. Dec. 312; *Hunt v. Thompson*, 2 Allen, 341. In the case of an assignee in bankruptcy, the law casts upon him the legal title to the unexpired term of a lease, and he thus becomes assignee of the term by operation of law, unless from prudential considerations he elects to reject the term as being without benefit to the creditors. But it is held that a receiver *pendente lite*, appointed in an equity suit, does not by taking possession of a leasehold estate become an assignee of the term in any proper sense of the word: *Gaither v. Stockbridge*, 67 Md. 222.

Generally, in an action by the lessor to recover rent reserved in a lease, against one in possession of demised premises, a *prima facie* right to recover is established by showing him to have been in actual possession at the time the rent became due, and the presumption of law is that he occupied as assignee of the original lessee: *Ecker v. Chicago etc. R. R. Co.*, 8 Mo. App. 223. But this presumption may be rebutted, and the party exonerated from liability to the lessor, by showing that he was not assignee in fact, and had

no interest in the lease, but occupied by permission of the lessee as under-tenant or otherwise: *Kain v. Hoxie*, 2 Hilt. 311; *Bagley v. Freeman*, 1 Id. 196; *Quackenboss v. Clarke*, 12 Wend. 555; *Mariner v. Crocker*, 18 Wis. 251.

Liability Generally of Lessee and his Assignee. — The lessee of land, notwithstanding his assignment of the lease, continues liable upon express covenants therein. The reason of the rule is, that although by the assignment the privity of estate between lessor and lessee is terminated, there still remains the privity of contract between them created by the lease, which is not affected by the assignment, although made with the assent of the lessor, and the lessee still continues liable on his covenant by virtue of the privity of contract: *Garner v. Byard*, 23 Ga. 289; 68 Am. Dec. 527; *Barhydt v. Burgess*, 46 Iowa, 476; *Oswald v. Fratenburgh*, 36 Minn. 270. Thus the assignment of a lease does not annul the lessee's obligation on his express covenants to pay rent, even though the lessor has accepted the assignee as his tenant, and collected rent from him: *Wilson v. Gerhardt*, 9 Col. 585; *Harris v. Heachman*, 62 Iowa, 411; the lessee continues liable on covenants in the lease to pay rent and taxes, although accrued subsequent to the assignment: *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64; *Mason v. Smith*, 131 Mass. 510; *Dwight v. Mudge*, 12 Gray, 23. And although the assignment be by act of law, and the estate be taken from the lessee against his consent, he nevertheless continues liable upon his express covenants: *Auriol v. Mills*, 4 Term Rep. 94, 99. So while the lessor may resort to his lessee upon his covenants in the lease, he may at the same time resort to the assignee of the lease upon the privity of estate. When the assignee accepts the assignment of a lease he takes it *cum onere*, subject to the payment of the rent which shall thereafter become due, and to the performance of the covenants running with the land, which, by the terms of the lease, the lessee was bound to perform: *Bedford v. Terhune*, 30 N. Y. 458; 86 Am. Dec. 394; *Bailey v. Richardson*, 66 Cal. 416; *Graves v. Porter*, 11 Barb. 592; *Bailey v. Wells*, 8 Wis. 141; 76 Am. Dec. 233; *Wills v. Dryden*, 52 Mo. 319; *Overman v. Sanborn*, 27 Vt. 54; *Sutliff v. Atwood*, 15 Ohio St. 186; *Journey v. Brackley*, 1 Hilt. 447; *Webster v. Nichols*, 104 Ill. 160; *Mason v. Smith*, 131 Mass. 510. The assignee of a lease takes it subject to a covenant therein to pay taxes, and a subsequent assignment by him will not relieve him from liability for a breach occurring during his possession: *State v. Martin*, 14 Lea, 92; 52 Am. Rep. 167; *Salisbury v. Shirley*, 66 Cal. 223. And although the assignment is by operation of law, still the assignee takes subject to the rights and equities of the original parties. Thus a purchaser at sheriff's sale of the unexpired term of a coal-mining lease takes the lessee's place under the lease, and like the tenant, is liable for all taxes on improvements placed by himself on the land: *In re Huddell*, Dist. Ct. E. D. Pa., 1883.

Assignment over by Assignee. — The assignee of a lease is liable for all such breaches of the covenants as occurred during the time of his enjoyment, but he may discharge himself from all liability for subsequent breaches by assigning over to another person, even though the assignment be made for the express purpose of avoiding his responsibility, and a premium be given as an inducement to accept the transfer: *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Johnston v. Bates*, 16 Jones & S. 180; *Tate v. McCormick*, 23 Hun, 218. He may exonerate himself from further liability by assigning to another, though the latter be a beggar, or a married woman, or a prisoner, provided the possession be relinquished, and the assignment be not colorable merely: *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 164; *Johnson v. Sherman*, 15 Cal. 287; 76 Am. Dec. 481; *Taylor v. Shum*, 1 Bos. & P. 23; and by

reassigning to his assignor he discharges himself from liability to the original lessor for rent subsequently accruing: *Dengler v. Michelssen*, 76 Cal. 125. The assignee of a lease is only bound by the covenants therein so long as he retains the possession, by himself or his tenants, of the demised premises. He is not liable to the reversioner upon the ground of a privity of contract, but solely by virtue of his actual occupation and beneficial enjoyment. Possession is both the foundation and the boundary of the liability: *Carter v. Hammett*, 18 Barb. 608; *Armstrong v. Wheeler*, 9 Cow. 88; *Astor v. L'Amoureux*, 4 Sand. 524. But compare *Walton v. Cronly*, 14 Wend. 63; *Babcock v. Scoville*, 56 Ill. 461. It is held in *Guinzburg v. Claude*, 28 Mo. App. 258, that the assignee of a lease becomes responsible for rent by reason of privity of estate, and not by reason of his occupancy of the premises under the lease. See also *Board of Public Schools v. Trust Co.*, 5 Id. 91.

Assignment or Sublease, Effects of, Distinguished. — As already seen, if the lessee assigns his whole estate without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenant to pay rent, or any other covenant in the lease which runs with the land: See also *Salisbury v. Shirley*, 66 Cal. 223; *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492; *Hicks v. Martin*, 25 Mo. App. 359. If, however, the lessee sublets the premises, reserving or retaining any reversion in himself, however small, the privity of the estate is not established, and the original lessor has no right of action against the sublessee, there being neither privity of contract nor of estate between them: *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601; 55 Am. Rep. 844; *Harvey v. McGrew*, 44 Tex. 412; *Robinson v. Lehman*, 72 Ala. 401. Unless it be necessary or proper for the protection of his own rights, the original landlord cannot lawfully interfere with the possession of the under-tenant, or disregard the rights conferred upon him by the sublease: *Ritzler v. Raether*, 10 Daly, 286. But an injunction will be granted to restrain a lessee from assigning or subletting without the consent of the landlord, in violation of the covenants in the lease: *Barrington etc. Ass'n v. Watson*, 38 Hun, 545; *Sloan v. Martin*, 22 Jones & S. 87; 8 N. Y. St. Rep. 139. But covenants against assignment or underletting are liberally construed in favor of lessees, and when a tenant, without license from the landlord, takes a third person into copartnership with him, and lets such person into joint possession of the premises, it is not a breach of a condition in the lease against subletting: *Boyd v. Fraternity Hall Ass'n*, 16 Ill. App. 574; *Roosevelt v. Hopkins*, 33 N. Y. 81. It is, however, held that a lease upon shares is a personal contract which is forfeited by an assignment, and attempt to give the assignee possession without the consent of the lessor, and that the latter may take immediate steps to recover the possession: *Randall v. Chubb*, 46 Mich. 311; 41 Am. Rep. 165. On the other hand, it was held that the lessee of lands on shares for the term of one year after the crop is produced, and before it is gathered, may assign his lease or sell his share of the crop without the consent of the lessor, unless prohibited by the terms of the lease or contract, and that such assignment or sale will carry to the assignee or purchaser any option as to the terms of division, or manner of gathering the crop that the lessee would have had under the terms of the lease: *Dworak v. Graves*, 16 Neb. 706. A covenant in a lease not to assign without the consent of the lessor is waived forever by one license to assign: *Chipman v. Emeric*, 5 Cal. 49; 63 Am. Dec. 80; *Murray v. Harway*, 56 N. Y. 337; and a breach of such covenant is waived by bringing an action to restrain the use of the premises by the assignee in violation of a covenant in

the lease: *Chautauqua Assembly v. Alling*, 46 Hun, 582; but it is no answer to a breach of a covenant not to underlet that the lessor had waived another and distinct breach of such covenant in the same lease: *Seaver v. Coburn*, 10 Cush. 324. But an assignment of the term is not a breach of the covenant not to underlet: *Lynde v. Hough*, 27 Barb. 415. Where the whole term is assigned, there must be an express reservation to prevent every right and interest of the lessee from passing under the assignment. Therefore, if an assignment of a lease containing covenants of renewal is made without any express reservation, the right to renewals may pass to the assignee, although the *habendum* of the assignment merely sets out the existing term assigned, making no reference to the covenants of renewal: *Downing v. Jones*, 11 Daly, 245; and see *Kenney v. Wallace*, 24 Hun, 478; *Mott v. Richmyer*, 57 N. Y. 62.

If a lessee leases a part of the demised premises to another for the remainder of his term, with easements in the other part, this is an under-lease, and not an assignment: *McNeil v. Kendall*, 128 Mass. 245; 35 Am. Rep. 373. Where the lessor, in consideration of the lessee's assignment to him of under-leases of the demised premises, accepted a surrender of the original lease, "without prejudice" to the under-leases, it was held that he might recover rent from one of the sublessees, accruing after the assignment: *Beal v. Boston Spring Car Co.*, 125 Mass. 157; 28 Am. Rep. 216. If a lessee, after subletting, makes an assignment of the lease to the lessor, who receives and collects from the sublessee the rent reserved in the sublease, it is held that no merger is created, and that the lessor comes in as assignee of the reversion, and not as owner of the fee: *Bailey v. Richardson*, 66 Cal. 416. And where, during the term of a lease at a monthly rental, the lessee makes a lease of the premises for the unexpired term of the original lease at an advanced rental, and subsequently assigns all right, title, and interest under such sublease to the landlord in chief, such assignment does not constitute a merger of the title, so as to bar a recovery by the landlord in chief against sureties upon the original lease for rent subsequently accruing under it: *Hamilton v. Read*, 13 Daly, 436; and see *Townsend v. Read*, 13 Id. 198; 15 Abb. N. C. 285; *Ganson v. Tift*, 71 N. Y. 48; *Collins v. Hasbrouck*, 56 Id. 157; 15 Am. Rep. 407; *Dunlap v. Bullard*, 131 Mass. 161. Where the lessee moves to the leased premises a house in the occupation of a third person, who refuses to leave it, the occupant of the house, by voluntarily remaining therein, becomes a subtenant of the lessor, and subject to be dispossessed, under the unlawful detainer act, in default of payment of the rent by the lessee: *Pardee v. Gray*, 66 Cal. 524. But if a lessee sublets the leased premises, and the sublessee afterward, and during the term, takes a deed of the premises in fee-simple from the owner, and an assignment of the lease, the lease is terminated by the conveyance, and such sublessee cannot afterward maintain an action against the lessee for rent: *Liebschutz v. Moore*, 70 Ind. 142; 36 Am. Rep. 182.

COMMENCEMENT AND TERMINATION OF ASSIGNEE'S LIABILITY. — The general rule is, that the assignee of a lease, being liable only in privity of estate, is liable only for breaches accruing whilst he holds the estate as assignee, and not for breaches which occurred before he became assignee, nor after he has transferred his whole interest by assignment: *Patten v. Deshon*, 1 Gray, 325, 329. The privity of estate may at any moment, at the option of the assignee, be severed by assigning over, and he cannot be held liable under a covenant for payment of rent, taxes, etc., where the liability thereunder did not accrue until after an assignment over by him: *Johnston v. Bates*, 16 Jones & S. 180; *Tate v. McCormick*, 23 Hun, 218. But an assignee in

fact of a term of years is chargeable with the performance of covenants running with the land, although he has not taken actual possession of the demised premises: *Babcock v. Scoville*, 56 Ill. 461; *Walton v. Cromly*, 14 Wend. 63; and this rule applies as well to the assignee of such assignee: *Taylor v. Shum*, 1 Bos. & P. 21. So in England, and in states where the common-law doctrine of mortgage prevails, a mortgagee of leasehold premises is liable on the covenants in the lease, although he has never been in possession of the estate or received any benefit therefrom: *Williams v. Bosanquet*, 1 Brod. & B. 238; *Burton v. Barclay*, 7 Bing. 745; *Abraham v. Tappe*, 60 Md. 317; *McMurphy v. Minot*, 4 N. H. 251. Compare *Calvert v. Bradley*, 16 How. 593; *Walton v. Cromley*, 14 Wend. 63; *Polhemus v. Trainer*, 30 Cal. 685. But one who becomes assignee of a lease merely by operation of law is not in general liable under the covenants therein unless he takes actual possession: *Williams v. Bosanquet*, 1 Brod. & B. 238; and see *Welch v. Myers*, 4 Camp. 368; *Sutliff v. Atwood*, 15 Ohio St. 186; *People v. Dudley*, 58 N. Y. 323; *Hoyt v. Stoddard*, 2 Allen, 442; *Gaither v. Stockbridge*, 67 Md. 222. The liability of an assignee ceases with his possession, whether he assigns or is evicted: *Childs v. Clark*, 3 Barb. Ch. 52; 49 Am. Dec. 164; *Astor v. L'Amoureux*, 4 Sand. 524; but a partial eviction discharges the assignee only *pro tanto* from the payment of rent: *Stevenson v. Lambard*, 2 East, 575. Assignees of undivided and unequal interests in a lease are jointly and severally liable on covenants in the lease to repair and to deliver up the demised premises at the end of the term. Such covenants run with the land, and vest in point of benefit and liability in the assignees, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer: *Coburn v. Goodall*, 72 Cal. 498; and see *Fitch v. Johnson*, 104 Ill. 111; *Hayes v. Morrison*, 38 N. H. 95.

Rights of Assignee. — An assignee of a lease takes all his assignor's interest in the term assigned, and is entitled to the benefit of all covenants real annexed to the estate which make in his favor, such as covenants for quiet enjoyment, for further assurance, for renewal, for repair of the premises, and the like: *Pootmore v. Bunn*, 1 Barn. & C. 694; *Campbell v. Lewis*, 3 Barn. & Ald. 392; *Vernon v. Smith*, 5 Id. 11; *King v. Jones*, 5 Taunt. 418; *Smith v. St. Philip's Church*, 107 N. Y. 610. And, as a general rule, the assignee only can bring an action to recover damages arising from breaches of covenants running with the land, unless the nature of the assignment is such that the assignor is bound to indemnify him against such breaches of covenant by the reversioner or his assigns: *Bickford v. Page*, 2 Mass. 460; *Griffin v. Fairbrother*, 10 Me. 91; *Kane v. Sanger*, 14 Johns. 89. But an assignee cannot sue for breaches of covenant which occurred before the assignment to him: *London v. Richmond*, 2 Vern. 423; *Martin v. Baker*, 5 Blackf. 232; *Shelley v. Hearne*, 14 Tenn. 512; nor for breaches of covenants which do not run with the land: *Gorton v. Gregory*, 3 Best & S. 90; but he may maintain an action against a stranger for the negligent destruction of buildings on the demised premises: *Cook v. Champlain Trans. Co.*, 1 Denio, 91. A statute giving the assignee of a lease the same remedies as his assignor against breaches of the lessor's covenants does not extend to collateral covenants: *Norman v. Wells*, 17 Wend. 136, 152. What are covenants running with the land, and what are personal covenants, see Gear on Landlord and Tenant, sec. 84; Boone on Real Property, sec. 103.

Rights of Lessee after Assignment. — A lessee remains liable on his express obligations notwithstanding he may have assigned his lease: *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 641; *Smith v. Harrison*, 42 Ohio St. 180. And the

lessor may sue, at his election, either the lessee or the assignee, or may pursue his remedy against both at the same time, though of course with but one satisfaction: *Sutliff v. Atwood*, 15 Id. 186; *Whetstone v. McCartney*, 32 Mo. App. 430. In such case, the liability of the original lessee depends upon privity of contract, and continues during the whole term, while the liability of the assignee depends upon privity of estate created by the assignment, and continues only during the term he holds the legal title to the leasehold estate under the assignment: *Farrington v. Kimball*, 126 Mass. 313; 30 Am. Rep. 680; *Wiley's Estate*, 12 Phila. 152; *Shaw v. Partridge*, 17 Vt. 626. But a distinction is made between express and implied covenants in a lease, and the liability of the lessee in respect to the latter will be discharged by an assignment with the assent of the lessor, for the privity of estate upon which such liability depends is thereby destroyed, and the implied covenant or agreement canceled: *Sutliff v. Atwood*, 15 Ohio St. 186, 194. Thus where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee with the lessor's assent extinguishes the privity of estate between lessor and lessee, and the consequent implied liability of the latter to pay rent. And the lessor's assent to such assignment, where nothing to the contrary appears, may be implied from his charging the rent to the new tenant, and accepting payment thereof from him: *Lodge v. White*, 30 Ohio St. 569; 27 Am. Rep. 492; *Wadham v. Marlow*, 8 East, 316; *Smyth v. North*, L. R. 7 Ex. 242; *Patten v. Deshon*, 1 Gray, 325, 330; *Harvey v. McGrew*, 44 Tex. 412. And where a lease was assigned without the lessor's assent, and in violation of the terms of the lease, but the lessor, with knowledge of the assignment, accepted rent from the lessee's assignee, and made repairs and alterations at his request, this was held to amount to an acceptance of such assignee as tenant, and that rent accruing after the assignment could not be recovered from the original lessee: *Colton v. Gorham*, 72 Iowa, 324; and see *Levering v. Langley*, 8 Minn. 107.

So the assignee of a lease takes the whole estate of the lessee subject to the performance on his part of the covenants running with the land, and the law implies a promise to perform the duties thus imposed; and if, through his neglect or refusal to perform them, the lessee is obliged to pay rent, taxes, or other sums of money to the lessor under the covenants of his lease, he may recover the same from his assignee: *Burnett v. Lynch*, 5 Barn. & C. 589; *Moule v. Garrett*, L. R. 7 Ex. 101; 1 Eng. Rep. 207; *Farrington v. Kimball*, 126 Mass. 313; 30 Am. Rep. 680; *Mason v. Smith*, 131 Mass. 510; *Rawlings v. Duvall*, 4 Har. & M. 1; *Brinkley v. Hambleton*, 67 Md. 177. But the implied promise to perform the duties imposed upon the assignee by the acceptance of the assignment must be limited to the time he holds the estate under the assignment, and while by virtue of his privity of estate with the lessor he is liable to him for the performance of the covenants. That is, the implied promise cannot be made to include the payment of any sums, except those which as assignee he assumes, and for which, when he assigns over the lease, he is no longer liable to the lessee: *Wolveridge v. Steward*, 1 Car. & M. 644; *Walker v. Physick*, 5 Pa. St. 193; as where a lease, containing a covenant for the payment by the lessee of the taxes assessed upon the demised premises, is assigned without any covenant on this subject, the assignee is liable to the assignor for the amount of taxes accruing during his term and paid by the assignor, but is not so liable for taxes accruing after he has parted with his possession by assignment over to another: *Mason v. Smith*, 131 Mass. 510.

Under-tenant not Liable to Original Lessor.—At common law there is no privity of estate or contract between the lessor and the under-tenant of his lessee, and he can maintain no action against such under-tenant for the recovery of rent: *Holford v. Hauch*, Doug. 183; *Quackenboss v. Clarke*, 12 Wend. 555; *Fulton v. Stewart*, 2 Ohio, 215; 15 Am. Dec. 542, and note 543; *Krider v. Ramsay*, 79 N. C. 354; *Robinson v. Lehman*, 72 Ala. 401; *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601; 55 Am. Rep. 844. But in some of the states, as, for instance, in Missouri, this rule of the common law has been changed by statute, which places the under-tenant on the same footing with the assignee: *Hicks v. Martin*, 25 Mo. App. 359. See also *Robinson v. Lehman*, 72 Ala. 401. And at common law, if the original lessee fails to pay rent, the chief landlord may dispossess him, and the under-tenant with him, unless the under-tenant, in order to protect his possession, pays the rent: *Arnsby v. Woodward*, 6 Barn. & C. 519; *Ritzler v. Raether*, 10 Daly, 286. But the interest which an under-tenant acquires in the land by virtue of the sublease cannot be defeated by any act or omission of his lessor that does not derogate from the rights of the chief landlord. Thus if a tenant has underlet he cannot defeat the interest of the under-lessee by a surrender to the original lessor: *Eten v. Luyster*, 60 N. Y. 252; *Allen v. Brown*, 5 Lans. 280. Nor has he a right to waive any privilege which the law gives him, to the prejudice of his under-tenant: *Brown v. Butler*, 4 Phila. 71; and see *Great Western R. R. Co. v. Smith*, L. R. 2 Ch. Div. 235; *Mellor v. Watkins*, L. R. 9 Q. B. 400.

Miscellaneous Decisions Affecting Rights and Remedies of Parties after Assignment of Lease.—A lessor may grant the whole or any part of premises out of which rent issues, and the lessee will be bound to pay the whole or a proportionate share of the rent to the grantee, and the latter has all the remedies to enforce payment which the lessor had: *Crosby v. Loop*, 13 Ill. 625. If the lessor makes an unqualified grant of the leased land, the rent passes to the grantee as an incident of the reversion; but the lessor may sever the rent from the reversion by reserving it, or he may, by a grant of a part of the land to one person, or of the whole land to several persons, create a necessity for an apportionment of the rent between the different owners: *Dixon v. Brodrick*, 39 Ill. 372; *Cole v. Patterson*, 25 Wend. 456; *Russell v. Allen*, 2 Allen, 42; *Martin v. Martin*, 7 Md. 368; 61 Am. Dec. 364; *Ehrman v. Mayer*, 57 Md. 612. But it is held that the rent is not apportionable in such cases without the lessee's consent: *Bliss v. Collins*, 5 Barn. & Ald. 876; *Ryerson v. Quackenbush*, 26 N. J. L. 254; and the apportionment must be according to value, and not quantity or number of acres: *Van Rensselaer v. Gallup*, 5 Denio, 454; *Biddle v. Husman*, 23 Mo. 597; unless there be no proof upon the subject as to value: *Van Rensselaer v. Jones*, 2 Barb. 643. Where the rent is apportionable, an action by the lessor for his portion of the rent need not be limited to that part, but he may sue for the whole, and recover as much as the jury may find him to be entitled to, and he will be barred as to the residue: *Van Rensselaer v. Gallup*, 5 Denio, 454; *Worthington v. Cooke*, 56 Md. 51.

If the assignee accepts the assignment of a lease prior to the rent becoming due, he takes it *cum onere*, and he must pay the whole rent when it becomes due, and he cannot collect a portion of it from his assignor, the lessee. The rent, as between them, in the absence of any special agreement, cannot be apportioned: *Graves v. Porter*, 11 Barb. 592; and see *Bedford v. Terhune*, 30 N. Y. 458; 86 Am. Dec. 394.

If several persons hold the entire interest of the original lessee of premises, not as joint purchasers, but by separate deeds of assignment, each of them

an undivided interest, they are not jointly liable to the lessor for the whole rent, but each assignee is severally liable for a part only, according to his interest in the premises as compared with the whole interest under the lease: *Babcock v. Scoville*, 56 Ill. 461.

In Illinois, by provision of statute, the landlord cannot, in a proceeding against the original tenant, distrain the goods of such tenant's assignee, although they formerly belonged to the tenant and are found on the demised premises: *Howdyshell v. Gary*, 21 Ill. App. 288. This is a modification of the common-law rule, under which all goods found upon the demised premises, whether belonging to the tenant or under-tenant, or a stranger, are liable to distress for rent due from the tenant: See *Stevens v. Lodge*, 7 Blackf. 594; *Kleber v. Ward*, 88 Pa. St. 93; *McCreery v. Clafflin*, 37 Md. 435; 11 Am. Rep. 542.

A court of equity has jurisdiction of a suit brought by a lessor of premises to enforce payment of rent against the assignee of the unexpired term by the sale of specific property, upon the ground that a lien for that purpose is reserved upon the property, — in other words, to enforce that lien, whether it be legal or equitable. But if the object of the suit is simply to obtain a decree against a legal assignee for the rent due from him, a court of equity has no jurisdiction, for the remedy would be complete at law: *Webster v. Nichols*, 104 Ill. 161.

No recovery can be had by the assignee of a lessor for rents due from the lessee, under the common counts in *assumpsit*, against parties guaranteeing the payment of the rent and performance of the covenants of the lease. A recovery against the guarantors, if at all, must be upon their guaranty: *Potter v. Gronbeck*, 117 Ill. 404.

If a lessor brings ejectment against an assignee of the lessee to recover possession of the demised premises, after the expiration of the term, he is not thereby estopped from maintaining a subsequent action against the assignee to recover damages for a breach of a covenant in the lease to surrender the possession at the expiration of the term, when all claim for damages, by reason of the unlawful withholding, is expressly waived in the prior action: *Coburn v. Goodall*, 72 Cal. 498.

An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee on the covenants in the lease: *Cox v. Bishop*, 8 De Gex, M. & G. 815.

COGGINS'S APPEAL.

[124 PENNSYLVANIA STATE, 10.]

WILLS — CONSTRUCTION — PERPETUITIES. — Where a testator bequeaths an equal share of the income of a trust fund to each of his four children for life, and upon the death of either or each, then one fourth of the residuary estate to go to the use of his or her child or children who attains the age of twenty-five years, and the issue of any or of such as should die under that age leaving issue, in equal shares, but if more than one, such issue to take their parents' share *per stirpes*, and if any of the testator's children should die without issue surviving, then the share so limited to his or her child or children to go to the other children and their issue upon the limitations above set forth, and then by codicil di-

rects that distribution shall be made *per capita* among the grandchildren instead of *per stirpes*, and no grandchildren are born after his death, — such bequests to the grandchildren are contingent, and vest only when he or she shall have attained the age of twenty-five years; and as those born before and after the testator's death are included, and as under the will the vesting of the remainders may be postponed for more than twenty-one years after the death of a life tenant, the rule against perpetuities is violated, and remainder void.

WILLS — LEGACY, VESTED OR CONTINGENT. — Where there is any serious doubt whether a legacy is vested or contingent, the doubt should be resolved in favor of vesting, if such conclusion can be reached by a fair and reasonable construction of the whole will, and not from particular expressions.

WILLS — PERPETUITIES. — Rule that future interests must vest within a life or lives in being, and twenty-one years thereafter, must be tested by possible, and not by actual, events, and if the gift is to a class, and is void as to any of the class, it is void as to all.

WILLS. — WHERE PARTICULAR ESTATE OR INTEREST FOR LIFE is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution.

WILLS — PERPETUITIES. — Future estates limited upon a life estate, which will not certainly take effect within twenty-one years, and the usual period of gestation thereafter, and after the termination of the life estate, are void as against perpetuities.

WILLS — CONTINGENT REMAINDER. — Where the attainment of a certain age forms part of the original description of the devisee, the vesting of the estate is suspended until the attainment of that age, even though the limitation over is only to take effect in case of his death under that age without issue.

J. Howard, Gendell, and John G. Johnson, for the appellant.

Edwin S. Dixon and J. B. Townsend, for the appellees.

PAXSON, C. J. This contention is about the proper construction of the will of the late Thomas Williamson. The testator bequeathed his estate in trust for the benefit of his wife and children. The provisions for the wife are not involved in this case. To each of his children he gave an estate for life. The clause of his will which affects this controversy is as follows: "And upon and after the decease of my wife, to continue the management as aforesaid, for the benefit of my said four children, and so distribute and pay the whole net income of my residuary estate as that each of them shall receive an equal fourth part thereof in half-yearly payments from time to time during his and her respective natural life; and upon the decease of either of my said children, and successively of each of them, then as respects one equal fourth part of the *corpus*

or principal of my residuary estate, to and for the only proper use of his or her child, or all of his or her children, if more than one, who shall have attained, or shall attain, the age of twenty-five years, and the issue of any such who shall have died, or shall die, under that age leaving issue, in equal shares; so, however, that the issue of any such deceased child, if more than one person, shall take equally among them such share only as their parent would have taken if living; but if either of my said children shall die without leaving a child, or issue of a child, him or her surviving, then as respects the share of any residuary estate above limited to the use of his or her child or children, I will and direct shall be held for the equal use and benefit of my other children, and their respective issue, and upon and subject to the trusts and limitations hereinbefore expressed and contained."

By a codicil, the testator directed distribution among grandchildren *per capita* instead of *per stirpes*, and that as to the children of his daughter, Anna W. Stackhouse, no portion of the principal coming to them should be paid during the lifetime of their father, Amos Stackhouse.

The testator left surviving four children, all of whom are yet living, and eleven grandchildren, ten of whom are yet living, and mostly over twenty-five years of age. One grandchild is deceased without issue. No grandchildren have been born since the testator's death.

The contention of the appellant is, that the will and codicil are to be construed as giving an interest to all grandchildren, whether born during the life of the testator or at any time afterwards; that the remainder after the life estate does not vest until the grandchildren are twenty-five years of age respectively, and as they or some of them may not attain that age until more than twenty-one years after their parent's death, the gift is within the rule against perpetuities, and therefore void; that the testator died intestate as to the remainder after the life interests; the children take it as next of kin to the testator, and their life interests and the remainders coalesce.

The auditing judge sustained the view of the appellant, and directed distribution of the *corpus* of the estate to the four children of the testator. Upon exceptions to his adjudication, the orphans' court reversed the auditing judge, and sustained the trusts in the will. An opinion was delivered by each of the learned judges who differed from the auditing judge, in which,

while they agree as to the result, they are not altogether in harmony in the mode of reaching it. It is a satisfaction to know that with the opinions of the learned judges of the orphans' court, and the oral and printed arguments of the learned counsel respectively, we have before us about all that can be profitably said on either side.

Where there is any serious doubt whether a legacy is vested or contingent, such doubt should be resolved in favor of vesting. In *Chess's Appeal*, 87 Pa. St. 362, 30 Am. Rep. 361, it was said by Sharswood, J., in delivering the opinion of the court: "The inclination of the courts is always in favor of the vesting of legacies, because in ninety-nine cases out of a hundred it is the intention of the testator that his bounty should be transmitted to the children or family of the beneficiary, otherwise, indeed, full effect is not given to it." And the question, whether vested or not, is always to be determined by a fair and reasonable construction of the whole will, and not from any particular expressions: *Schott's Estate*, 78 Pa. St. 40; *McArthur v. Scott*, 113 U. S. 340; *Leeming v. Sherratt*, 2 Hare, 14; *Bayley v. Bishop*, 9 Ves. 6; Redfield on Wills, sec. 37; Gray on Perpetuities, secs. 278, 641; Randall on Perpetuities, 85. On the other hand, we have a rule of property, founded upon the highest considerations of public policy, and too firmly imbedded in our system of jurisprudence to be disturbed, save by an act of assembly, which requires that all future estates limited upon a life estate which are not sure to take effect within twenty-one years and the usual fraction after the determination of the life estate are void in their creation: *Davenport v. Harris*, 3 Gratt. 164. Where the language of a will leaves us in doubt whether this rule has been transgressed, we may well resolve the doubt in favor of vesting, especially when, upon a careful examination of the whole will, we may reasonably infer such to have been the intent of the testator. But where the language employed is not ambiguous, and is clearly transgressive of the rule, it is useless to grope after a supposed intent of the testator. The rule itself must be sustained in all its integrity, or abandoned. We prefer the former course.

The gift of the remainder is to the grandchildren as a class. The vital question is, When did it vest? It was said by Lord Mansfield, in *Baldwin v. Karver*, Cowp. 309, that "the point to be determined in gifts of this character, however general in their terms, is, When does the legacy vest?" In some in-

stances it may be upon the death of the testator; in others, upon the death of the first taker; and in yet other instances, it may be upon the happening of a contingency. In either event, it is the time of vesting which determines who shall take. In a note to *Andrews v. Pattington*, 3 Bro. C. C. 401, Mr. Eden arranges the cases in three classes, as follows:—

1. Where there is simply a general devise to children or other persons as a class, in which it comprehends all persons answering that description at the testator's death.

2. Where there is a previous life estate, in which case all the persons answering the description at the extinction of that life are included.

3. Where the bequest is to children generally, payable at a certain period, as at twenty-one or marriage, in which case all children are let in who come into *esse* before the first child attains the period appointed.

It is a conceded principle that the future interest must vest within a life or lives in being and twenty-one years. It is not sufficient that it may vest. It must vest within that time, or the gift is void,—void in its creation. Its validity is to be tested by possible, and not by actual, events. And if the gift is to a class, and it is void as to any of the class, it is void as to all. Authority is scarcely needed for so familiar a proposition. It is sufficient to refer to *Leake v. Robinson*, 2 Merv. 363; *Porter v. Fox*, 6 Sim. 485; *Blagrove v. Hancock*, 16 Id. 371; *Dodd v. Wake*, 8 Id. 615; *Newman v. Newman*, 10 Id. 51; *Vawdry v. Geddes*, 1 Russ. & M. 203; *Williams on Real Property*, 305; *Perry on Trusts*, sec. 381; *Lewis on Perpetuities*, 456; *Hillyard v. Miller*, 10 Pa. St. 326; *Smith's Appeal*, 88 Id. 492. The last case is cited upon this point alone. Subsequent reflection has left some doubt in my mind as to the soundness of the ruling in that case upon the main question involved, and as I wrote the opinion I may be allowed to criticise it. Of the principles above referred to, there can be no manner of doubt.

We regard it as equally clear that the time when the gift must vest is the death of the life tenants respectively. There is not a word in the will from which any legal inference can be drawn that the remainder was to vest in the grandchildren at the death of the testator. The language is: "And upon the decease of either one of my said children, and successively of each of them, then as respects one equal fourth part of the *corpus* or principal of my residuary estate, to and for the only

proper use of his or her child, or of all of his or her children," etc. The word "then," in this connection, is evidently not used as an adverb of time; it merely means "in that case." But if we treat it as an abverb of time, it evidently refers to the death of the life tenant. That is the period the testator is speaking of, and the gift is to all the grandchildren, whether born during the lifetime of the testator or at any time afterwards. A child born the day before the death of the life tenant would come within the description. Moreover, we are in no doubt that such was the intent of the testator. Why should he cut off all grandchildren born after his death? They would have been as near to him in blood as those born during his life, and we cannot assume without reason, and in the face of the clear language of his will, that he intended to deprive after-born grandchildren of all share of his estate. Moreover, the gift to the grandchildren was to them as a class.

We need not go out of our own state for authority for the proposition that the gift is to all grandchildren living at the death of the life tenant. In *Minnig v. Batdorff*, 5 Pa. St. 503, it was held: "When there is an intermediate gift to children, those only living at the testator's death will take; but it is now settled that where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace, not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution." In *Haskins v. Tate*, 25 Pa. St. 249, it was held that a gift to "my son Robert's children, he and them enjoying the benefits of it whilst he lives," gave a life estate to Robert, remainder to his children, and that children born after the death of the testator were entitled to share in the estate. This is in accordance with the rule laid down by the best text-writers, and with many of the English and American cases. In the leading case of *Leake v. Robinson*, *supra*, it was said: "Whenever a testator gives to a parent for life, remainder to his children, he does mean to include all the children such parent may at any time have." The doctrine was finally established in the house of lords in *Boughton v. Boughton*, 1 H. L. Cas. 406. See also *Hall v. Hall*, 123 Mass. 120; *Fosdick v. Fosdick*, 88 Id. 41.

Assuming that the gift is to all the grandchildren, whenever born, we reach the vital question in the case, When does it vest? If it vests at the death of the tenant for life, or within twenty-

one years thereafter, it is outside of the rule against perpetuities, and the gift is good. The contention of the appellant is that the gift is contingent or executory, and does not vest in interest until the grandchildren respectively attain the age of twenty-five years.

The age does not merely relate to the time of payment. The gift is to those "who shall have attained or shall attain the age of twenty-five years." It is unnecessary to discuss the long line of cases in which the time of vesting and the time of payment, and the effect of such words as "when," "at," or "if," are discussed. Whenever possible, the courts have held that these words refer to the time of payment, in order that the estate may be held to be vested. But in all such cases there has been some previous gift, express or implied, by which the party was to have some benefit from the gift prior to the time fixed for payment; such as the payment of interest, a provision for maintenance, or other matters of a like nature. And it appears to be well settled that unless there be some gift, express or implied, in order to so apply the word, there is no vesting until the time of payment, and the person to receive must be ascertained at that time. "A legacy shall be deemed vested or contingent, just as the time shall have been annexed to the gift or the payment of it. And where there is no separate and antecedent gift which is independent of the direction and time for payment, the legacy is contingent": *Moore v. Smith*, 9 Watts, 403. In *Hawkins on Wills*, 241, 242, it is said that the nice distinctions respecting vesting and payment do not arise "where the attainment of the given age is made part of the description of the devisee; as if the devise be to all and every the children of A who shall attain twenty-one, or to such children of A as shall attain twenty-one, with a gift over on attaining that age. . . . Until they have attained that age no one completely answers the description which the testator has given of those who are to be devisees under his will; and therefore there is no person in whom the estate can vest. . . . It is *prima facie* contingent, notwithstanding a gift over in default of a child or children who should fulfill the required condition."

It would seem clear, from the language of the will, that the age of the grandchildren refers not merely to the time of payment or distribution, but is descriptive of the persons who take. A grandchild who dies before arriving at twenty-five takes no interest; nothing which he can dispose of by will or otherwise; nothing which can descend to his heirs. It is true, there is a

gift over to the issue of a grandchild dying before reaching the specified time, but in such case the issue takes, not as heir or next of kin of his parent, but as the devisee of Thomas Williamson. Nor is there any provision for the payment of interest to or for maintenance of a grandchild prior to his or her arriving at the age of twenty-five years. The provision in regard to age is descriptive of the persons who shall take under the will, for no one can tell until that time arrives who will be entitled. The gift to each grandchild is contingent upon his arriving at twenty-five years of age. In our own case of *McBride v. Smyth*, 54 Pa. St. 245, this subject was thoroughly discussed by Mr. Justice Strong, who said: "The first question raised by the bill and answer is, whether the children of Francis McBride, the testator, took under his will a vested interest in the land described at his death, or whether whatever interest any of them took under the will first vested when the youngest child attained the age of twenty-one years. In regard to this we have no doubt. The testator devised all the residue of his estate, including the property described in the bill as sold to the defendant, to trustees, to hold until his youngest child who might then be living should attain the age of twenty-one years, upon certain defined trusts, and upon the youngest of his children who might be living attaining the age of twenty-one years, he gave, subject to a provision for his widow, all his said (residuary) estate, real, personal, and mixed, to such of his children as might be living at that time, their heirs, etc. This is not a mere postponement of the time of enjoyment. It is a selection of individuals from a class to be donees of a right; a description of persons, not a regulation of the interest given. It is impossible to admit that a gift to such a number of persons as may meet a defined description is a gift to all the persons, whether they meet the description or not. The rule of legal construction, as well as the testamentary intent in such cases, is well stated in *Smith on Executory Interests*, 281. It is this: 'Where real or personal estate is devised or bequeathed to such children, or to such child or individuals, as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is contingent on account of the person. For until the age is attained, the char-

acter is sustained, or the act is performed, the person is unas-
certained; there is no person answering the description of the
person who is to take as devisee or legatee.' If, then, we are
to seek for the intention of the testator in the language of his
will, we must conclude he gave no vested interest in his re-
siduary estate to any of his children, that the devises were
contingent and became vested only when the youngest child
living attained the age of twenty-one years, in such children
as were then in life." This case has been frequently followed;
one of the later cases is *Mergenthaler's Appeal*, 15 Week. Not.
441.

It was urged, however, that a conclusive answer to this line
of argument is found in the limitation over to the testator's
surviving children upon the death of a child without issue liv-
ing; that under the authorities the effect of that limitation was
to show that the attainment by the grandchildren to the age
of twenty-five years was not a condition precedent to the vest-
ing of their interests, but was simply a designation of the time
at which those interests were to be paid; that the suspending
of possession did not affect the integrity of the gift. We may
concede the latter part of this proposition. This is not a ques-
tion of the suspending of the possession, but of the vesting of
the interest. If vested, the matter of the suspending of the
possession or enjoyment could be easily disposed of. The first
part of the proposition is an argument in favor of vesting, but
it lacks the conclusive character claimed for it. In a doubtful
case it would be persuasive, but where the nature of the inter-
est is clear, it is entitled to but little weight. There is abun-
dant authority, some of which has been already cited, that
where the attainment of a certain age forms part of the
original description of the devisee, the vesting is suspended
until the attainment of that age, even though the limitation
over is only to take effect in case of his death under that age
without issue: *Smith on Executory Interests*, sec. 366. In
Leake v. Robinson, *supra*, it was said, referring to the implica-
tion from the gift over: "When the vesting is so clearly and
expressly postponed, it is in vain to infer, from other expres-
sions used without any reference to that object, that the testa-
tor did not conceive himself to have postponed the vesting."
In *Davenport v. Harris*, 3 Grant Cas. 164, there was such a
gift over, but the interest was held to be contingent on reach-
ing the prescribed age, and therefore void, because too remote.
In *Seibert's Appeal*, 13 Pa. St. 501, there was a gift for life to a

daughter, remainder to her children as they arrived at the age of twenty-one, with a gift over in case the daughter did not have any issue living at the time of her death, and it was held contingent, and a granddaughter who died after her mother (the life tenant) under the prescribed age took nothing under the will. See also *Bull v. Pritchard*, 1 Russ. 213; *Hunter v. Judd*, 4 Sim. 455; *Judd v. Judd*, 3 Id. 525; *Ring v. Hardwicke*, 2 Beav. 352; *Pickford v. Brown*, 2 Kay & J. 426; *Vawdry v. Geddes*, 1 Russ. & M. 203.

It was further urged that by the terms of the codicil the gifts to the grandchildren are severable. We are unable to see the force of this proposition. The provision that they shall take *per capita* does not make them so, nor can we attribute such an effect to the direction that as the grandchildren respectively attain the age at which they become entitled to possession, their shares shall be determined, not by the number who may become so entitled, but by the number of grandchildren then living. The fact remains that the gift is to a class, and not to particular persons of a class, and whether a member of the class can take depends upon the contingency of his or her arriving at the age of twenty-five years.

Measuring this will by its possibilities, not by the facts as they happened to be, it is easy to see that grandchildren may be born within one year before the death of a life tenant, in which case the gift could not vest within the period fixed by the rule against perpetuities. We must be careful not to strain the law so as to avoid this rule. It is founded upon a sound principle of public policy, and should be rigidly enforced. We are constrained to hold that the gift to the grandchildren is void, and that the estate must be distributed to the children who have the life estates.

This conclusion meets the substantial justice of the case.

The decree is reversed, at the costs of the appellees, the adjudication of the auditing judge is affirmed, and it is ordered that distribution be made in accordance therewith.

WILLS—PERPETUITIES. — The rule against perpetuities is discussed at length in a monographic note to *Barnum v. Barnum*, 90 Am. Dec. 101-106. If by possibility a devise may operate to tie up property, and render it inalienable for a period longer than a life or lives in being, and twenty-one years thereafter, with a fraction of a year added for the term of gestation, it is void as against the rule of perpetuities: *Davis v. Williams*, 85 Tenn. 646, and cases there cited; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337.

WILLS, LEGACIES IN, WHETHER VESTED OR CONTINGENT: See *Reed's Appeal*, 118 Pa. St. 215; 4 Am. St. Rep. 588, and note 592; *Willett's Adm'r v. Rutter's Adm'r*, 84 Ky. 317; *Chess's Appeal*, 87 Pa. St. 362; 30 Am. Rep. 361; *Goebel v. Wolf*, ante, p. 464, and monographic note, p. 471.

WILLS. — The application of the rule *per capita* or *per stirpes* must be controlled by the general intention of the testator: *Risk's Appeal*, 52 Pa. St. 269; 91 Am. Dec. 156. Where a testator devised all his property to his wife for life, directing at her death that what remained of his estate in her hands should be equally divided among his children then living, and the descendants of such as might be dead, share and share alike, taking into consideration all advancements made either by himself or wife, the will gave the wife a life estate, with power of disposition, and to the testator's children alive at the wife's death, and the descendants of such children as were dead, a vested remainder, and the descendants would take *per stirpes*, not *per capita*: *Wood v. Robertson*, 113 Ind. 323.

WILLS — DEVISES TO A CLASS. — Under a devise to a class, where, by reason of the legal incapacity of the others, only one person in the class can take, he takes all the estate which the devise by its terms gives to the whole class: *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *Womack v. Smith*, 11 Humph. 478; 54 Am. Dec. 51; *Collin v. Collin*, 1 Barb. Ch. 630; 45 Am. Dec. 420.

MCCURDY'S APPEAL.

[24 PENNSYLVANIA STATE, 99.]

WILLS — MANDATORY TRUST. — Where a testator creates a trust in his residuary estate by providing that "I give and bequeath the same to my executors, to be devoted and given by them to such institutions or uses as they in their best judgment may consider the most compatible with the views and instructions which I have given them," and expressly providing that no part of such estate should pass under the intestate laws, such trust is mandatory, and gives the executors a discretion in carrying out the orders and instructions of the testator according to his judgment, and not a discretion to distribute the estate according to their judgment.

WILLS — EXHAUSTED TRUST. — Where the testimony of the executors, one of whom is dead, is the only evidence of the object of a trust, and they, by solemn instrument under seal, against their interests, declare that they have fully carried out or provided for all the objects of the testator's bounty, as expressed by him in his secret instructions to them, further inquiry as to unexecuted instructions will not be required.

WILLS — EXHAUSTED TRUST — DISTRIBUTION OF BALANCE. — Where a trust by a testator is established, but its terms are not stated in the will, the only evidence of its objects being the testimony of the executors, and they, by solemn instrument, under seal, declare that they have fully carried out or provided for all the objects of the testator's bounty, as expressed by him in secret instructions to them, and that there is an unappropriated balance which they claim as their own; the purposes of the trust being exhausted, such balance must be distributed under the intestate laws, though that be contrary to the testator's express desires.

CLAIM for an unexpended balance of a residuary estate, arising out of a secret trust created by Henry J. Stout, who died, leaving a will naming John K. McCurdy and Joseph S. Brewster as executors. This claim is made by said McCurdy and the executors of said Brewster, since deceased, to such balance, under facts which appear from the opinion. Judgment was rendered against them in the court below, and they assign error.

George W. Biddle and Henry M. Dechert, for the executors of Joseph S. Brewster, appellants.

John G. Johnson, for John K. McCurdy, surviving executor, appellant.

Mayer Sulzberger, for the next of kin, appellees.

MITCHELL, J. 1. The will of Henry J. Stout clearly created a trust as to the residuary estate disposed of by the fortieth clause. The language is: "I give and bequeath the same to my executors, . . . to be devoted and given by them to such institutions or uses as they, in their best judgment, may consider the most compatible with the views and instructions which I have given them," etc. What is given to the executors by this clause is not a discretion to distribute the estate according to their judgment, but a discretion to carry out the orders received from the testator. He had his own intentions and scheme of distribution, and he meant that they should control the disposition of his estate to the end. In the circumstances under which he made his will, being apparently apprehensive that his speedy death might avoid some of his bequests to charities, he was obliged, not only to commit a large discretion to his executors as to the means to be employed to accomplish his wishes, but to trust entirely to their integrity for its exercise. But his intent that they should follow his judgment, not their own, is entirely clear; and his language to that effect is as mandatory as the nature of the circumstances permitted.

This plain intent clearly separates the case from the class of gifts of an unlimited discretion of disposal, of which *Beck's Appeal*, 116 Pa. St. 547, is the latest illustration. In that case, the testator gave his executor "full and unlimited power and authority to appropriate and dispose of the residue, . . . to such objects, persons, or institutions as in his discretion shall be best and proper." By this language, he clearly sub-

stituted the judgment and will of his executor for his own, not only as to the methods of disposal and appropriation, but also as to the objects themselves. The distinction between this and the mere discretion as to the disposition most compatible with the testator's instructions previously given is too obvious to need further discussion.

2. There being, then, a clear creation of a trust, we have to inquire whether it has been fully carried out. What the trust was could only be learned through the conscience of the executors. It was not put in writing, but communicated to them, presumably orally, in testator's lifetime. The testimony of the executors was, therefore, the only evidence attainable as to the objects of the trust. The testator died in February, 1875, and on May 25, 1877, both the executors being then living, they executed a declaration of trust under their hands and seals, in which, after reciting that they had paid all the legacies presently due and secured those to come due after termination of life estates, they set forth, "that being the utmost extent (with exceptions hereinafter set forth) to which, after years of reflection, Mr. Stout wished his estate to be applied for either charitable purposes or the benefit of relatives, as he repeatedly declared to executors," etc. They then set forth that the residue is their own by law, but that, nevertheless, they deem it their duty, and therefore do appropriate and devote certain sums to purposes that they declare to be in accordance with testator's instructions, and then finally proceed to divide the remainder between themselves.

As already noted, the testimony of the executors is the only evidence of the objects of the trust. By a solemn instrument under their hands and seals, against their interests, that is, against their asserted legal right to the whole of the residue, they declare that they have fully carried out, or provided for, all the objects of testator's bounty, as expressed by him in his secret instructions to them. What further evidence is attainable? One of the executors is since dead, and to send the matter back now to the survivor to say whether there are still any unexecuted instructions of the testator would be to do the vain thing of asking him to repeat his declaration made when the matter was fresh in his recollection, or to offer to self-interest a premium to stimulate memory to recall further instructions, which, twelve years ago, he and his co-executor solemnly asserted over their hands and seals not to exist. A court of equity is not called upon to take any such step.

There being therefore a trust, and the purposes of it being exhausted, the balance remaining is not covered by the will, and as to it, however contrary to his desires, the decedent died intestate. The decree awarding this balance to the next of kin was correct.

Decree affirmed.

WILLS. — WHERE A WILL GAVE THE EXECUTOR full and unlimited power of disposal and appropriation of the residue to such persons, objects, or institutions as in his discretion should be best and proper, because the testator had "full confidence in his judgment, ability, and integrity," an appropriation by the executor himself, subject to his further disposal in his last will and testament, was a valid execution of the power conferred upon him by the will: *Appeal of Beck*, 116 Pa. St. 547, and cases cited in the opinion thereto. But this case is distinctly distinguished in the principal case, wherein the discretion of the executor under the will is more narrow and limited.

CREW, LEVICK, & Co. v. McCafferty.

[124 PENNSYLVANIA STATE, 200.]

NEW TRIAL. — COURT MAY IMPOSE TERMS upon granting a new trial.

AMENDMENT OF JUDGMENT. — The court may amend its record so as to make it conform to the truth, even after the term has expired or writ of error lodged; but the court has no power to make an alteration in the record which is not an amendment, and without support from the record, and when its effect is to deprive defendant of a new trial, the right to which by lapse of time had become absolute, and beyond the power of interference from the court below.

Theodore F. Jenkins, for the plaintiffs in error.

H. W. Gimber, for the defendant in error.

PAXSON, C. J. The plaintiff below recovered a verdict for \$113. The defendants obtained a rule for a new trial, and, after argument, the court made the following order: "March 21, 1887; rule discharged on condition that the plaintiff, within ten days, file a *remittitur* for all damages over seventy-five dollars; otherwise rule absolute."

There is no doubt as to the power of the court to make this order. It may impose terms upon granting a new trial, and this is the constant practice: *McBride v. Daniels*, 92 Pa. St. 332.

The plaintiff's attorney filed a *remittitur* in accordance with the above order on April 20, 1887. This, it will be observed, was not within ten days, and the rule for a new trial consequently became absolute. Next in point of time followed the order of court which is the subject of the present contention.

It is as follows: "And now, to wit, September 22, 1888, it is ordered that the record be corrected so as to read: Rule discharged on condition that the plaintiff, within thirty days, file a *remittitur* for all damages over seventy-five dollars, and costs; otherwise rule absolute." This was eighteen months after the original order had been made, and several terms had intervened.

We have no doubt of the power of the court to amend its record so as to make it conform to the truth, even after the term has expired or writ of error lodged in the office. The wealth of authority upon this question is so great that it is almost unnecessary to draw upon it. I will refer only to two of our latest cases: *Cohn v. Scheuer*, 115 Pa. St. 178; *Smaltz v. Hancock*, 118 Id. 550. If, therefore, the order of September 22, 1888, was an amendment of the record, the case would be free from difficulty. But it was not in any sense an amendment. There was nothing upon the record to amend by. It is conceded the original order of court specified ten days as the time within which the *remittitur* should be filed. It is true, the words "ten days" were omitted from the order as copied upon the appearance docket. That was a mistake of the clerk which the court had the power to amend at any time. This amendment appears to have been made, as the words "ten days" are interlined on the docket. But the entry of September 22d was an original order, with nothing upon the record to support it. It was an alteration, not an amendment, the effect of which was to deprive the defendants of their right to a new trial, which right, by reason of the lapse of time, had become absolute, and beyond the power of the court below to interfere with it.

The judgment is reversed, and a *venire facias de novo* awarded.

JUDGMENTS — AMENDMENTS. — Judgments may be amended *nunc pro tunc* after lapse of term, when the record discloses that the judgment as amended would have been entered in the first place but for the inadvertence of the court or the error of the clerk: *Adams v. Re Qua*, 22 Fla. 250; 1 Am. St. Rep. 191, and note 194. And a record may be amended in the lower court pending proceedings by writ of error or on appeal, and as so amended be certified to the appellate court: *Reed v. Barker*, 2 Cow. 408; 14 Am. Dec. 515, and note. Though the supreme court has power to direct or allow amendments to the record below of a cause while an appeal is pending, it is clear that it has no such power after a final judgment therein has been rendered: *Walton v. McKesson*, 101 N. C. 428. The theory of the law is, that during the term of a court, all proceedings rest in the breast of the judge, and he can amend the record according to the facts within his own knowledge: *Hansen v. Schlesinger*, 125 Ill. 230.

WILKINSON v. BUIST.

[124 PENNSYLVANIA STATE, 253.]

WILLS — POWER OF SALE. — Although the time for the exercise of a power of sale contained in a will may not be limited by any words used in its creation, still the intention of the testator as to the time of its exercise may be ascertained from the terms of the entire will and its manifest general scheme and purpose.

WILLS — POWER OF SALE. — Where a power of sale to executors contained in a will is, when taken alone, without limitation as to time for its exercise, but is exercisable, in their discretion, at any time after the testator's death, and yet it appears from an interpretation of the entire will that it was the intention of the testator to limit the time for its exercise to the lifetime of his widow, its exercise after her death by the executors will create a defective title.

WILLS. — **POWER OF SALE** contained in a will, though expressed in the most general terms as to the time for its exercise, cannot be further exercised, if the purpose for its creation appears, and that purpose has ceased, as it will not be presumed that the testator intended that it should be exercised after the accomplishment of its purpose.

WILLS. — **DURATION OF POWER OF SALE** in a will as to the time for its exercise is governed by the intention of the testator in all cases; and when the limitations in a settlement by will have expired, and absolute interests in fee have vested in possession in persons *sui juris*, it may well be supposed that the testator intended that a power of sale, without limitation of time for its exercise, will not thereafter be exercised; but if a contrary intent appears from the will, the power will be upheld, unless obnoxious to the rule against perpetuities, or the *cestui que trust* has elected to take the property as it stands.

ASSUMPSIT against R. A. Wilkinson, to recover the contract price of a piece of land under a written contract of sale providing that when such price was paid, a good and marketable title should be made, clear of all encumbrance. This contract was made in June, 1887; and in May, 1888, when the time for performance had arrived, a deed was tendered, signed by Robert Buist, Helen J. Buist, and Emma L. Chalmers, claiming, as tenants in common, to be possessed of a good and marketable title to the land. This deed Wilkinson refused to accept, claiming that the parties joining in the deed were not possessed of such title, and that Stella Buist and Jane Buist were tenants in common in the land. Robert Buist, Sen., died in July, 1880, and left a will, by which he granted his widow, Ellen M. Buist, a life estate in the land, with an unlimited power of sale, as to the time of its exercise, in his executors, and then provided that, upon the death of his wife, his property remaining should be divided into six shares, which he bequeathed to Robert Buist, Stella Buist,

Jane Buist, Helen J. Buist, and Emma L. Chalmers. Ellen M. Buist, the widow, died in February, 1881; and the present controversy arises over the interpretation of the power of sale in the will. Plaintiff had judgment below, and Wilkinson assigns error. Other facts are stated in the opinion

Richard C. Dale and Samuel Dickson, for the plaintiff in error.

Wayne MacVeagh and A. H. Wintersteen, for Jane Buist, intervening.

Richard C. McMurtrie, for the defendant in error.

CLARK, J. The controlling question in this case is upon the true construction of the last will and testament of Robert Buist, the elder, deceased. The power of sale to the executors, apart from the other provisions of the will, is framed in the most general terms; it is wholly without limitation as to time, and taken alone, was exercisable in their discretion "at any time" after the testator's decease. But although the time for its exercise is not limited by any words used in its creation, the limitation to which it is really subject may appear upon a consideration of the testator's general design in the disposition of his estate, as shown by the will; for although the power was to be exercised "at any time" in the discretion of the executors, yet this may be ascertained to mean at any time within some period fixed in the testator's mind, but not fully expressed, ascertainable, however, from the manifest general scheme and purpose of his will. Whether this was a power which the executors might exercise in the lifetime of the widow, or at any time afterwards, is therefore a mere question of intention, to be ascertained from a study of the entire instrument by which the power was created.

It is plain that the first and principal subject of the testator's solicitude was his wife. After providing for the payment of his debts, etc., he gave to her the furniture, provisions, etc., on hand, and directed his executors to pay to her semi-annually, for and during the term of her natural life, the entire income and interest of the residue of his personal estate, and then in the fourth clause devised to her directly, for life, all his real estate. The fifth clause contains the power of sale, which gives rise to this contention. It is in the following words: "I authorize and empower my said executors, and the survivors or survivor of them, at any time after my decease,

in their discretion, to sell and convey, in fee-simple, to any person or persons, for such price or prices as they shall deem sufficient, all or any portion of my said real estate whatsoever, and wheresoever situate."

Although this power, as we have said, is in the most general terms, yet the testator's purpose in creating it is, we think, clearly disclosed in what follows. The testator provides that "the proceeds of all such sales of my real estate, whenever made, shall be held by my executors, in trust, for the uses and purposes declared in this my will, in relation to the said real estate"; that is to say, the proceeds shall be held for the use of his wife, the interest and income thereof payable to her, during her life. In confirmation of this, the testator further provides, as follows: "And I further direct that all investments and reinvestments of the proceeds of such sales, as well as of my personal property and estate, shall be made in first mortgages of improved real estate, situate in the city of Philadelphia, in the public loans of the state of Pennsylvania, or of the United States, of the city of Philadelphia, or in such other securities as may be authorized by law"; with power to change the investment, etc.

These provisions of the will plainly show that the testator had in his mind a period of time within which this power to sell was to be exercised; that is to say, within the lifetime of the widow; the proceeds, all the proceeds of the sales, were to be held in lieu of the land, and to be invested with the personal estate for her use, and this implies of course that the sales were to be made in her lifetime.

This theory of the will is further established, moreover, by the fact that in the sixth clause the testator provides that "immediately" after the decease of his wife the whole of his real and personal estate, "including the proceeds of all such real estate as shall have been sold by his executors in the lifetime of his wife shall be divided into six equal parts," and go to his children and grandchildren as therein directed.

It is clear that these sales were not for the payment of debts, as the proceeds were not to be so applied; they were not for the purpose of division or distribution, as the division was not to be made in the widow's lifetime, but "immediately" after her decease, upon the precise footing of the estate as it then existed. The manifest design of the testator was, that in the lifetime of the widow the best interests of his estate should be protected and promoted by his executors, one

of them being his widow, the life tenant, the other two his children, devisees in remainder; that the real estate should be subject to sale, in their discretion, at any time during the life of the widow, but at her death the whole estate as it then existed should be distributed to those entitled.

Under this construction of the will, it seems unnecessary to decide what would be the effect of an unlimited power, or rather what the effect of a determination of the life estate, without more, upon such a power. A power of sale without limit would doubtless be bad under the rule against perpetuities, and a testator will not be presumed to have intended anything so absurd. Such powers, when framed in general terms, may therefore, in some cases, as stated by Sir George Jessel, in *Peters v. Lewes etc. R. R. Co.*, L. R. 18 Ch. Div. 429, be limited by the limitations of the settlement contained in the will. But this is merely upon the presumption that the testator so intended, for in the very case cited, although the life estate had actually terminated, the power was upheld, it appearing from the will that the testator had created it for the purpose of division. Upon the same principle, although the power may be expressed in the most general terms, yet if the purpose of its creation appears, and that purpose has ceased, there can ordinarily be no further execution of the power, as it will be presumed that the testator did not intend that the power should be exercised after the accomplishment of that purpose: *Wheate v. Hall*, 17 Ves. 80; *Wolley v. Jenkins*, 23 Beav. 53; *Swift's Appeal*, 87 Pa. St. 502.

It is the testator's intention, with respect to the duration of a power, which governs in all cases. When the limitations contained in a settlement by will have expired, and absolute interests in fee have vested in possession in persons *sui juris*, it may well be supposed that the testator intended that a power of sale will not after that be exercised; but if, on the construction of the instrument, it appears otherwise, and that the testator intended it should be afterwards exercised, the power will of course be upheld, unless it is obnoxious to the rule against perpetuities, or the *cestuis que trustent* have elected to take the property as it stands: *In re Cotton's Trustees etc.*, L. R. 19 Ch. Div. 624.

On the other hand, as was said by Sir Edward Fry in the case just cited, "it is well ascertained that when there is a settlement of real estate, either by will or by deed, and the settlement ultimately carries the land to a person entitled in

fee-simple, and there are powers couched in general words, and without limitation as to time, which are nevertheless obviously intended to be exercised only during the subsistence of the intermediate limitations, there, the moment the estate in fee is vested, the powers are at an end, because it was the intention of the settlement that they should subsist only during the intermediate limitations." The vesting of the estate absolutely in the persons ultimately entitled is an indication merely that, according to the true construction of the settlement, the intention of the settlor was that the powers would, in that event, come to an end. To the same effect, although the cases are not wholly similar, is our own case of *Kaufman v. Hollinger*, 4 Week. Not. 27.

The validity of the title here, as stated by the counsel for defendant in error, depends upon the construction of this will; it is either certainly good or certainly bad, as the law may be determined one way or the other. It is not a question, therefore, of a doubtful title dependent upon disputed facts. If we are right, however, the title is defective, and the plaintiff, Robert Buist, is not entitled to recover.

The judgment is reversed.

WILLS — CONSTRUCTION OF. — In construing a will, the intention of the testator is to be ascertained, and in looking for such intention, the surrounding circumstances may be taken into consideration: *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 545; *Phelps v. Bates*, 54 Conn. 11; 1 Am. St. Rep. 92, and note 96.

In the case of *Fidler v. Lash*, 125 Pa. St. 87, the principal case was referred to and followed. By the will there in question the testator gave and bequeathed all his real estate, personal and mixed property, to his wife for her use as long as she lived, and after her death the remainder to be divided among certain legatees named in the will. The will also ordered the executors, if they saw proper, to sell the real estate, and put the money accruing therefrom, with other moneys, out at interest, and to pay the interest over to the testator's wife every year. The executors were the wife of the deceased, and one Vanderslice. No sale was attempted until after the death of the widow, when the surviving executor made a sale of the property at public auction, and afterwards executed a conveyance in pursuance of such sale. The title depending upon such conveyance was objected to upon the ground that at the time of the sale the surviving executor did not possess any power to sell. In sustaining this objection, the supreme court said: "The devise, as we have seen, is to the widow for life, remainder in fee-simple to Sarah Ermentrout and plaintiff below as tenants in common. It appears to have then occurred to the testator that, for the better and more certain support of his widow, it was advisable to authorize his executors, in their discretion, to sell the real estate, invest the proceeds, etc.; and he accordingly created the testamentary power in question, directing the proceeds of the sale to be invested, and interest paid annually to his widow, with the right to use as much of the principal

as might be necessary for her support. It was very evident that testator's wife was the chief object of his bounty, and that the power was created for her benefit, and for no other purpose. There is nothing in the will to indicate that it was intended to be exercised for the purpose of converting the land into money to pay debts or for distribution. The sole object was to provide for the support of the widow, in case his executors considered it necessary to sell for that purpose. The power was therefore exercisable only during her lifetime, and upon her death it ceased to exist. No principle is better settled than that when the object for which a power had been created has been accomplished, or has become impossible or unattainable, the power itself ceases to exist: *Wilkinson v. Buist*, 124 Pa. St. 253; *ante*, p. 580; *Eby v. Dix*, 6 West. Rep. 509, and the cases there cited. The reasoning of our brother Clark in the first cited case is applicable here."

HUBBARD & Co. v. TENBROOK AND BROTHER.

[124 PENNSYLVANIA STATE, 291.]

PRINCIPAL AND AGENT. — Where one is conducting a separate business in his own name, but with the property and as the agent of an undisclosed principal, the latter cannot escape liability for goods sold the former by a secret limitation on his authority to purchase.

Joseph L. Tull, for the plaintiffs in error.

Joseph De F. Junkin, for the defendants in error.

MITCHELL, J. This case affords one among many examples of the failure of the so-called reformed procedure to accomplish anything towards the brevity, the clearness, the accuracy, or the convenience of legal forms. So long as the fundamental principle of our remedial jurisprudence shall be that, upon conflicting evidence the jury shall ascertain the facts, and upon ascertained facts the judges shall pronounce the law, so long will it be a cardinal rule of pleading, by whatever name pleading shall be called, that the line of distinction between facts and the evidence to prove them shall be kept clear and well defined. The notion of the reforming enthusiast that the average litigant or his average lawyer can make a shorter, clearer, or less redundant statement of his case if left to his own head than if directed and restrained by the settled forms, sifted, tested, and condensed as they have been by generations of the acutest intellects ever devoted to a logical profession, is as vain as that of any other compounder of panaceas.

The plaintiff's statement is at least three times as long as a declaration in the established forms need have been, and about half of it is occupied, not with the averment of facts, but with a recital of evidence. Indeed, the strongest argument for the

defendants is, that the statement fails to aver two essential facts, to wit, the delivery of the goods to Sides, and the agency of Sides for the defendants as his undisclosed principals.

Fortunately for the plaintiff, his statement is helped out as to the first fact by the bill of particulars, which, being sworn to be a copy of his book of original entry, imports delivery as well as sale. The agency, though stated in the objectionable form of an inference from the previously recited evidence, is clearly intended to be averred, and may fairly be so treated.

Taking the statement, therefore, in its plain intent, it sets out that plaintiff sold and delivered a quantity of hams to one Sides, who was conducting a grocery business in his own name, but with the property and as the agent of defendants. The defendants filed an affidavit of defense, and a supplementary one, the substance of which is, that "Sides was not the agent of defendants to purchase from plaintiffs, or any one else," and that he "was employed as salesman only by said defendant, without any authority whatever to act for or bind defendants for the purchase of any goods or merchandise upon credit of the said defendants." We have thus the question presented, whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation on the agent's authority to purchase.

The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public.

No exact precedent has been cited. None is needed. The rule so vigorously contended for by the plaintiff in error, that those dealing with an agent are bound to look to his authority, is freely conceded, but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the faith of such authority, conclusively estopped from denying it.

The affidavits set up no available defense, and the judgment is affirmed.

AGENCY. — WHERE AN AGENT VIOLATES HIS DUTY TO HIS PRINCIPAL, and is guilty also of a wrong to a stranger, whereby the employer is directly and

pecuniarily benefited, the wrong is the wrong of the principal as well as of the agent, and he stands in the same legal situation as the agent: *Little Pittsburgh etc. Co. v. Little Chief etc. Co.*, 10 Col. 223; 7 Am. St. Rep. 226. Third persons dealing with agents in good faith are not bound by the limitations placed on the agent's authority by the private instructions of the principal, which are not known to such third parties, nor properly inferable from the nature of the agent's employment: *Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78; *Carmichael v. Buck*, 10 Rich. 332; 70 Am. Dec. 226; *Williams v. Getty*, 31 Pa. St. 461; 72 Am. Dec. 757. Authority of a general agent cannot be limited by private instructions not known to the party who deals with him: *Walker v. Skipwith*, Meigs, 502; 33 Am. Dec. 161; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Towle v. Leavitt*, 23 N. H. 360; 55 Am. Dec. 195; *Commercial Bank v. Kortright*, 22 Wend. 348; 34 Am. Dec. 317. When a contract for the purchase of land is made by one person in his own name, but in fact as the agent of an undisclosed principal, and the latter has entered into possession in pursuance thereof, and made valuable improvements, the vendor may sustain *assumpsit* against the principal for the recovery of the purchase-money: *Hall v. White*, 123 Pa. St. 95. The contract of a drummer not to sell a certain class of goods to any other merchant in a town except the purchaser is within the apparent scope of his authority, and binding upon his principal: *Keith v. Herschberg*, 48 Ark. 138.

LAFFERTY v. SCHUYLKILL RIVER (EAST SIDE) RAILROAD COMPANY.

[124 PENNSYLVANIA STATE, 297.]

EMINENT DOMAIN. — When a railroad company locates its line of road over the lands of private owners, it secures a right to enter upon and occupy the land covered by such location, and though actual entry cannot be made until the damages accruing to the owner shall be paid or secured, and though the parties cannot agree upon the amount of damages, still the owner cannot prevent the exercise of the right of eminent domain by the company.

EMINENT DOMAIN — COMPENSATION FOR GROWING CROPS. — When a railroad company locates its line of road over the lands of a private owner, he may either abandon the land covered by the line as located, and proceed to have his damages assessed, or he may continue to occupy and cultivate until actual entry by the company, and if he plants crops after the location and before notice and bond given by the company, he is entitled to damages for their destruction as well as for injury done to the land.

EMINENT DOMAIN — TENANT'S RIGHT TO COMPENSATION FOR GROWING CROPS. — When a railroad company has located its line of road upon the lands of a private owner, and the latter leases it with notice to the tenant of the location, the latter has the right to occupy and cultivate the land until actual entry, and is entitled to damages for the destruction of his growing crops planted before notice when his possession would be interfered with, but he cannot be heard to complain that the value of his term has been diminished.

TRESPASS by plaintiff in error against defendant in error, to recover damages for constructing a railroad through a farm of which plaintiff was tenant of the owner. From the evidence it appears that defendant in error located a line for a railroad over the land of such landlord in April, 1885, when negotiations were commenced for a settlement of the land damages. These were arranged in December, 1885, and executed by writing January, 1886, when the company bought a strip of ground sixty feet wide through such land, paying therefor a certain sum "free from all tenants' claims." Grading then commenced, and the purchase-money was paid and a deed executed in the next February. The construction of such road destroyed the crops planted on the land by plaintiff in error. Plaintiff in error became the tenant of the owner of the land on August 31, 1885, for the term of five years, under a lease which provided that "it is further agreed that the said John J. Krider (the owner) shall not be liable to the said Henry Lafferty for any losses or reductions in rent of said premises by reason of the present contemplated railroad passing through the premises." Plaintiff in error at once went into possession of the land, and cultivated and planted it until stopped by the winter. Plaintiff in error was nonsuited, and appeals.

Preston K. Erdman, R. Loper Baird, and Joseph Hopkinson, for the plaintiff in error.

William H. Addicks and Lewis C. Cassidy, for the defendant in error.

WILLIAMS, J. When a railroad company locates its line of road over the lands of private owners, it secures thereby a right to enter upon and occupy the land covered by such location. The actual entry cannot be made until the damages accruing to the owner shall be paid or secured, but the means for ascertaining the damages are provided by law, where the parties cannot agree upon them, and the owner cannot prevent the exercise of the right of eminent domain by the company. But while the owner has notice by the location of the road over his lands of the purpose of the company to appropriate so much as the line of the road covers, he has no notice of the time when actual possession will be required. He may doubtless abandon the land covered by the line as located to the company, and proceed to have his damages assessed; or he

may wait for the company to take the initiative and continue meantime to occupy and cultivate it. If he takes the latter branch of the alternative, the crops planted after the location and before notice or bond given by the railroad company are proper subjects for compensation.

The reason for this is, that it may be months or even years after the location of the line before the company will be ready to enter upon the land for purposes of construction or to take the steps necessary for the assessment of damages, and the owner has a right to remain in possession until actual appropriation of his land by the company. This was held in *Gilmore v. Railroad Co.*, 104 Pa. St. 275, and has been recognized in other cases. If, therefore, Krider had made no lease of his land, but continued to cultivate it himself, he would have been entitled to claim damages, as well for the loss of growing crops as for the injury done to the land, provided the crops had been planted before bond given or notice of an intent to enter upon the construction of the road. But Krider made a lease to Lafferty, and the tenant planted the crops that were destroyed. He had notice of the fact that a line had been located over the land. The court so found, and we think the evidence was sufficient to justify the finding, but it is not alleged that he had any notice of the time when the company intended to make an actual entry. So far as he had notice, he was of course affected by it, and he cannot now be heard to complain that the value of his term has been diminished, and his just expectations disappointed by a circumstance of which he had full notice, and which his lease shows had been considered before he executed it; but being without any notice of the time when his possession would be interfered with, he had the same right to occupy and cultivate that his lessor could have exercised if the lease had not been made. The lease transferred the possession, with the attendant right to cultivate, from the lessor to the lessee, and the right to be paid for an injury done to growing crops passed with the right to plant them. When the railroad company made their entry upon the land, they found Lafferty in possession and his crops in the ground. They were fixed with notice of his lease by his possession, and they could not discharge their liability to him by payment to his landlord.

This branch of the plaintiff's claim seems to have escaped the attention of the court below, and for this reason only the

judgment of nonsuit must be reversed, and a *venire facias de novo* awarded.

EMINENT DOMAIN: See extended monographic note to *Sheehy v. Kansas City Cable R'y Co.*, 4 Am. St. Rep. 399-405.

MENDINHALL'S APPEAL.

[124 PENNSYLVANIA STATE, 387.]

WILLS — REVOCATION BY CODICIL. — When a testator, by a codicil, revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being conditional, and dependent on a contingency which fails. This rule applies to cases where the falsity or error of the alleged fact rested, not in the personal knowledge of the testator, but was assumed upon information derived from others.

WILLS — REVOCATION BY CODICIL. — Where a testator revokes a bequest to his daughter by a codicil, giving as a reason therefor that he had, since the execution of his will, made a gift and loan to her husband, such codicil will not be set aside on the ground that the transaction was a sale, and not a gift, and that no loan was made, when the facts were peculiarly within the knowledge of the testator, and the transaction was in effect an advancement, and so regarded by him.

PETITION for distribution of a balance in the hands of administrators. It seems that John Marshall died in May, 1885, leaving a will, dated July, 1877, together with a codicil, given hereafter. The will made provision for the testator's widow, and gave to each of his daughters an almost equal amount of the estate. To one of them he devised as follows: "I give and bequeath to my daughter Lydia S. Mendinhall the sum of twenty thousand dollars, for her sole and separate use." In 1880 and 1881, Marshall was the owner of certain sheet-iron rolling-mills, and to start Edward Mendinhall in business (he being the husband of Lydia, mentioned above), and the mills in successful operation, a corporation was organized, with Mendinhall as president and manager, the corporation buying the mills for forty thousand dollars, twenty-five thousand of which was secured by bond and mortgage, and the balance by stock of 150 shares at one hundred dollars each. In February, 1881, Marshall and Mendinhall entered into an agreement by which Marshall agreed to assign absolutely to Mendinhall the capital stock of fifteen thousand dollars, when the same issued to him, and Mendinhall agreed to

execute and deliver to Marshall a bond for five thousand dollars, to secure interest on that sum at six per cent, payable semi-annually to Marshall during his natural life; and he also agreed to pay the latter any dividends declared on two thousand five hundred dollars of the stock for five years, and that if either of the parties died within the five years, then such dividends to become Mendinhall's absolutely. Mendinhall executed the required bond in April, 1881, and Marshall received the interest payments until April, 1885. The corporation was formed, the mills conveyed to it, the mortgage executed and delivered, and the corporation put in successful operation in March, 1881. In April, 1881, a certificate for the 150 shares of stock was issued to Marshall, and, on the same day, transferred to Mendinhall, to whom a new certificate issued, and the old one was canceled. The codicil before mentioned read as follows: "Whereas, since the execution of the foregoing will, I gave to my son-in-law, Edward Mendinhall, husband of my daughter Lydia S. Mendinhall, 150 shares of stock in the Marshall Iron Company, the par value of which is one hundred dollars per share, making fifteen thousand dollars, and have also loaned him the sum of five thousand dollars, for which he has given me his bond, now, in consequence thereof, I do annul and revoke the legacy of twenty thousand dollars given by me in my said will to my daughter, the said Lydia S. Mendinhall, and in lieu and stead thereof, do give and bequeath to her, her executors and administrators, absolutely, the said bond for five thousand dollars given to me by her said husband as aforesaid, with all interest that may be due thereon at the time of my death. And I do hereby ratify and confirm my said will in all other respects."

Thomas W. Pierce and Benjamin Nields, for the appellant.

R. S. Waddell and R. T. Cornwell, for the appellees.

PAXSON, C. J. The learned auditor and court below held that the legacy to the appellant of twenty thousand dollars was revoked by the codicil to the testator's will, and that she is only entitled to her share of the residue of the estate. The contention of the appellant is, that this ruling is erroneous for the reason that the testator based his revocation of the legacy on the ground that the facts alleged by him in the codicil were true; that as the reason for the revocation has failed, the revocation itself falls, and the appellant is entitled to be

paid the twenty thousand dollars. The rule as laid down in the text-books appears to be this: "And here it may be observed, that when a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being, it is considered, conditional and dependent on a contingency which fails": 1 Jarman on Wills, 357; 1 Powell on Devises, 523; 2 Roberts on Wills, 210; 1 Williams on Executors, 208. The two cases especially relied upon by the text-writers in support of this proposition are *Campbell v. French*, 3 Ves. 317, and *Doe ex dem. Elizabeth Evans v. Henry Evans*, 10 Ad. & E. 228. The learned auditor has collected a large number of cases, mostly English, upon this subject, which in the main sustain the text-writers.

The principle referred to may be conceded to be correct when applied to cases in which the falsity or error of the alleged fact rested, not in the personal knowledge of the testator, but was assumed upon information derived from others, as in the case of *Campbell v. French*, *supra*, where by his will the testator gave legacies to A and B, describing them as grandchildren of C, and then residing in America. By a codicil he revoked these legacies, giving as a reason that the legatees were dead. That fact not being true, and being necessarily derived from information of other persons, the legatees were held to be entitled to the legacy, notwithstanding the revocation. In the case in hand, the reason given by John Marshall, the testator, for the revocation of the legacy of twenty thousand dollars to his daughter, the appellant, was, that he had since the execution of his will given to his son-in-law, Edward Mendinhall, the husband of the appellant, one hundred and fifty shares of stock in the Marshall Iron Company, the par value of which was one hundred dollars per share, and had also loaned to him the sum of five thousand dollars. The appellant contends that this statement was untrue; that the transfer of the stock to his son-in-law was a sale, not a gift, and that he had never loaned him the five thousand dollars. The facts were, that the testator transferred this stock to Mendinhall upon an agreement with the latter that he (Mendinhall) should "execute and deliver to the said John Marshall his bond for the sum of five thousand dollars to secure the payment of interest on that sum at the rate of six per cent, payable semi-annually to the said John Marshall for and dur-

ing the term of his natural life, and further agrees to pay to said John Marshall the dividends that may be declared on two thousand five hundred dollars of the capital stock of said company when and as declared for the term of five years from date of transfer as aforesaid, it being hereby agreed that if either the said John Marshall or Edward Mendinhall shall die within said five years, that then and in said case said dividends shall not thereafter be paid to said John Marshall, but shall belong thenceforth to said Edward Mendinhall, his executors, administrators, or assigns."

The object of this arrangement is apparent. The testator was conveying to his son-in-law fifteen thousand dollars of stock which it was believed would be valuable, and which in point of fact proved to be worth more than its par value, the dividends thereon being from ten to fifteen per cent. It was an advancement during the lifetime of the testator, over and above what his other children received at that time, and the provision for the bond of five thousand dollars, and for the dividends upon two thousand five hundred dollars of the stock, was doubtless intended to produce equality between his children, taking into consideration the testator's expectancy of life. Be that as it may, the testator regarded it as an advancement; in point of fact it practically was so; the testator had the right to so treat it; the facts were peculiarly within his own knowledge, and we cannot deny him the right to do what he pleased with his own property. Were we to reverse this case, and award the twenty thousand dollars legacy to the appellant, we would cause gross inequality in this estate; the appellant would receive her full share, and her husband would get in addition fifteen thousand dollars of valuable stock for which he has paid nothing beyond a reasonable consideration for the advancement in the lifetime of the testator.

The decree is affirmed and the appeal dismissed at the costs of the appellant.

WILLS — MISTAKE OF FACT BY THE TESTATOR. — Evidence *dehors* a will that it was made under a mistake as to the supposed death of the son of the testatrix, whose name is omitted therefrom, is inadmissible to impeach the will, but the mistake must appear upon the very face of the will, and it must also appear what the will would have been but for the mistake: *Gifford v. Dyer*, 2 R. I. 99; 57 Am. Dec. 708, and note 709. Compare *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642, and cases in note 643.

NEELY'S APPEAL.

[124 PENNSYLVANIA STATE, 406.]

HUSBAND AND WIFE. — ANTENUPTIAL SETTLEMENT made by the intended husband on the wife without a full disclosure of the value of his property, and whereby the provision secured for the wife is grossly disproportionate to the means of the intended husband, raises a presumption of designed concealment, and casts upon him the burden of proof to show that it is fair.

HUSBAND AND WIFE — ANTENUPTIAL SETTLEMENT — FRAUD — DURESS. — Where a widower of large means, aged sixty years, and the father of two sets of children, procures the signature of his intended wife, a spinster aged over fifty years, to an antenuptial settlement, in the presence of her nearest relatives, an uncle and two brothers, by the provisions of which he relinquishes all claim to twelve thousand dollars owned by her in her own right, and agrees to give her six hundred dollars per year after his death, in full of all her claims against his estate, she cannot after his death repudiate the settlement, on the grounds that she signed under duress, or that it was so disproportioned to his means as to create a presumption of fraud and intended concealment, especially after she has lived with him as his wife for ten years, and he has provided by will for the payment of the settlement, and left her his mansion-house so long as she wants to use it.

George Junkin, Joseph De F. Junkin, and R. T. Cornwell, for the appellant.

R. Jones Monaghan, J. Frank E. Hause, and H. T. Fairlamb, for the appellees.

PAXSON, C. J. The appellant in this case is the widow of Robert Neely, and she seeks to set aside the antenuptial contract between them, upon the ground that it is in fraud of her rights as widow, and was extorted from her unwillingly. At the time she married Robert Neely, the latter was a widower of about sixty years of age, had been twice married, and had issue living by each wife. The appellant was a spinster over fifty years of age. She had an estate of twelve thousand dollars; her husband had an estate several times larger. They were cousins, and after a short courtship, entered into an engagement of marriage. A few days before the time appointed for the marriage, after the cards were out and a caterer engaged, Mr. Neely called upon his betrothed with an antenuptial contract, prepared by his attorney, in which he relinquished all claim upon her estate, and covenanted to give her six hundred dollars per annum after his death, in full of all claim by her upon his estate. No disclosure appears to have been made by either as to the extent of his or

her estate. The appellant objected to signing the paper, thought it was mean, and shed some tears. Mr. Neely was a keen, shrewd, firm, business man, and told her, "If you don't sign it, there will be no wedding." Before the execution of the paper, however, he called in her nearest relatives, her uncle and two brothers; and the paper was fully read over and explained to her. One of her brothers was named as trustee in the contract. She does not appear to have asked any of them for advice. Several hours elapsed between the time Mr. Neely made known his wishes and the execution of the paper. She finally signed it. They lived together for some ten years, when her husband died, and by his will made a provision for the payment of the annuity of six hundred dollars, and left her, in addition, his mansion-house and furniture so long as she desired to use it. The court below has found as a fact that there was neither actual nor constructive fraud in the execution of the contract.

It was held in *Kline v. Kline*, 57 Pa. St. 120, 98 Am. Dec. 206, that the parties to an antenuptial contract were not like buyer and seller, dealing at arm's-length, but stood in a confidential relation calling for the exercise of the richest good faith, and while it might not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each, yet if the provision secured for the wife was unreasonably disproportionate to the means of the intended husband, it raised the presumption of designed concealment, and threw upon him the burden of proof. This was reiterated in *Kline's Estate*, 64 Pa. St. 122; in *Tiernan v. Binns*, 92 Id. 248; *Bierer's Appeal*, 92 Id. 265, and several subsequent cases. It is the well-settled law of this state. *Shea's Appeal*, 121 Id. 302, is not in conflict with these cases. It appeared in that case, and it is so stated in the opinion of the court, that Mrs. Shea could neither read nor write, and there was no proof that the instrument was read or explained to her, and there was no affirmative proof that she had knowledge of the paper she signed almost immediately before the marriage was celebrated.

As before remarked, neither party disclosed to the other the full extent of their means at the time the contract was executed. That each knew the other had means is not disputed. In the absence of such disclosure, the law appears to be that if the provision by the husband for his future wife was unreasonably disproportioned to his means, it raises the presump-

tion of designed concealment, and throws the burden upon him to show that it was fair. This brings us at once to the question, Was the provision for the wife unreasonable under the circumstances?

Before I discuss the facts upon this point, I will refer to one or two of our recent cases. In *Ludwig's Appeal*, 101 Pa. St. 535, a widower, fifty-seven years of age, and a poor widow of sixty-three years, being about to marry, executed an antenuptial contract, whereby the latter, in consideration of "one dollar, and of a comfortable support during life, and at her death a decent Christian burial," relinquished all her rights in the former's estate. The agreement recited that the intended husband owned "certain lands and tenements, also personal property"; the person who drew the document explained its effect to the woman before execution, and stated that the intended husband "had a large property," but the extent or value thereof was not made known to her. In fact, it amounted to over fourteen thousand dollars, and it was held that she was bound by the contract, and for this reason was not allowed the widow's exemption of three hundred dollars. It was said in the opinion of the court: "From a sentimental standpoint, the provision for the widow would not seem generous. But a widower of fifty-seven with eleven children seldom contracts a second marriage from mere sentiment. He may have thought it was enough, in view of her age and position, to give her a comfortable home, a decent support during her life, and a Christian burial after her death. At any rate, it is very clear she was of that opinion, and that is an end of the case." In *Smith's Appeal*, 115 Pa. St. 319, the antenuptial contract gave the wife twelve hundred dollars a year. His will gave her the income of fifteen thousand dollars additional; but that is immaterial. The estate of the husband for distribution was \$334,543.83. In that case, the appellant was a second wife, past middle age, and her husband was a widower, with children living by his first wife. We held that the disproportion of the provision for the wife to his means was not so great as to raise a presumption of fraud. There was no disclosure of the extent of the husband's estate.

Was the provision which Mr. Neely made for his intended wife so disproportioned to his means as to create a presumption of fraud or intended concealment? That the appellant knew when she signed the paper that he was a man of large means is clear from the fact that she objected to it on the ground of

its meanness. When we consider the question of the adequacy of the provision, we must regard all the circumstances surrounding the case. This was a marriage between persons well advanced in years. The appellant was not the mother of his children, nor was she likely ever to bear him any. She had not in any way aided him to accumulate his fortune. She had twelve thousand dollars of her own, all of which he relinquished. In addition, he gave her six hundred dollars per year during her life. What claim had this old woman, marrying this old man, to come in and take one third of his estate away from his children, and yet retain the whole of her own? She would of course have had a legal claim had he married her without an antenuptial contract; but she had no claim which made it inequitable or unjust in him to insist upon the execution of the contract before the marriage. It would have been a wrong to his own blood if he had not made some such arrangement. It was not a liberal provision, but it was adequate. She retains all of her own estate, and has now, in addition, six hundred dollars per year, besides a comfortable furnished home. Surely her last condition is better than her first

There is a marked distinction between this case and that of a young couple just entering upon the voyage of life. In the latter instance, they grow up together; the wife is the mother of his children; she shares his burdens in his early struggles, and often by her thrift and economy materially aids him in the accumulation of his fortune. To cut off such a wife with a mere support during life would be as unjust as it would be ungenerous. But when a man in the decline of life, who has been twice a widower, and who has two sets of children, for the third time leads a woman to the altar, and an elderly woman at that, it is very different. In such case, the wife reaps where she has not sown, and if she is provided with a comfortable support after her husband's death, she has no just cause of complaint. In any event, if she is dissatisfied, she ought to refuse to sign the contract, and not accept its benefits during her husband's life, and then seek to repudiate it after his death.

We need not consider the question of duress. She did not sign willingly; she was as thrifty a woman as he was a man, and did not resign the hope of acquiring a considerable estate to leave to her own blood without shedding a few tears; but she was not coerced; she did not sign under legal duress.

I have not discussed the competency of Samuel M. McClure as a witness. His testimony, if competent, could not change the result.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

HUSBAND AND WIFE. — The relation of persons who are betrothed is one of unbounded confidence, especially on the part of the woman; therefore such persons cannot be regarded in the same category with buyers and sellers, or as dealing with each other at arm's-length: *Kline v. Kline*, 57 Pa. St. 120; 98 Am. Dec. 206, and cases cited in note 208. A conveyance by a husband before his marriage, in contemplation thereof, will not be set aside for the purpose of giving the wife dower, if the intention of the grantor was to provide for his children by a former marriage, and not to defraud his wife: *Fennessey v. Fennessey*, 84 Ky. 519.

PATTERSON v. CALDWELL.

[124 PENNSYLVANIA STATE, 455.]

EXECUTIONS — CONTINGENT INTEREST UNDER WILL. — Where a testator by will provided for the distribution of the income of his estate, and then that "either at the death of the last survivor of my now living children or grandchildren who may be living at the time of my death, or at the expiration of twenty-one years from my own death, whichever event shall first happen," the principal of the estate shall vest absolutely in those entitled to the income. Until one of the events mentioned happens it is not determined who will be entitled to any part of the principal of the estate, and until then the interest of a legatee therein is contingent, and not subject to an execution attachment.

EXECUTIONS. — **EXPECTANCIES AND CONTINGENCIES** are not subject to assignment or execution attachment at law, and while equity will uphold assignments of contingent interests or expectancies and things resting in mere possibility, if fairly made, and not against public policy, yet only a thing which has a present and certain existence, although its possession and enjoyment may be postponed for a time, is subject to execution attachment. The latter cannot be levied upon expectancies or contingent interests.

JUDGMENT was obtained by J. A. Caldwell against Mrs. L. H. Lynde, and an execution attachment was issued thereon summoning R. E. Patterson and others, as executors and trustees under the will of Robert Patterson, as garnishees. Mrs. Lynde was one of the beneficiaries under said will, and the present suit arises out of one of the provisions thereof, as follows: "21. I direct that either at the death of the last survivor of my now living children and grandchildren who may be living at the time of my death, or at the expiration of

twenty-one years from my own death, whichever event shall first happen, any part of my estate which shall then be held in trust, under the terms of this my will for the payment of the income thereof to any person or persons, shall vest absolutely in and be transferred and conveyed by the said trustees or trustee to such person or persons, his heirs and assigns, absolutely and in fee-simple, and I declare that all trusts hereinbefore declared of and concerning my said estate are to be subject to this qualification." Neither of the events mentioned had happened at the time this suit was instituted. Judgment was rendered against the garnishees, and they appeal. Other facts are stated in the opinion.

John G. Johnson and Frank P. Prichard, for the plaintiffs in error.

Lewin W. Barringer, for the defendants in error.

McCOLLUM, J. If Mrs. Lynde has a vested interest in the principal of the estate of her father, this attachment can be sustained; if she has not, it must fall.

Her interest in the estate is defined by his will. It secures to her a share of the net income of the estate for a period designated in it. By its terms it creates an inalienable personal provision for her, which cannot be anticipated, pledged, or assigned, or made liable by legal proceedings for her debts, engagements, or contracts. It constitutes a spendthrift trust, and it is conceded that the income thus secured to her is not within the grasp of this attachment.

But it is claimed that she has an interest in the principal of the estate which may be attached and appropriated to the payment of her debts. The will appoints a time for the distribution and vesting of the principal of the estate. The persons who are then the recipients of the income of it will take it absolutely. But it is impossible to determine now who will at that time be entitled to receive the income and constitute the beneficiaries under the provisions of the will which dispose of the principal. We think, therefore, that Mrs. Lynde's interest in the principal of the estate is contingent. These conclusions result from a consideration of the whole will, and are in accord with the manifest intention of the testator. It is quite evident that it was not his purpose to subject the principal of his estate to seizure and sale for the debts of his children and grandchildren, while he carefully placed the income of it beyond the reach of their creditors.

Reed's Appeal, 118 Pa. St. 215, is relied on by defendants in error as sustaining their view that Mrs. Lynde has a vested interest in the principal of the estate. In that case the testator, having nine grandchildren, directed his executors to sell a certain portion of his farm, to divide the net proceeds of the sale into nine equal parts, and for the period of twelve years from the time of his decease to keep said net proceeds at interest and pay one ninth of the interest annually to each of said grandchildren, "or if any of them have died leaving heirs, then pay the same to said heirs, and at the full expiration of twelve years from my decease shall in like manner pay over the principal." In determining that the legacies to the grandchildren were vested at the death of the testator, it was said, *inter alia*: "It is to be noted that there is not in this will the faintest trace of an intent in case of the death of any of the grandchildren before the expiration of the twelve years to give the shares of those so dying to the survivors. The share of a grandchild that shall 'have died' is go to his heirs." But in our case, if Mrs. Lynde dies before the period appointed for the vesting of the estate, what she might have received had she survived that period goes, not to her heirs, but, at a time fixed by the will, to persons designated by the will to receive it.

It is further contended by the defendants in error that whatever may pass by an assignment is subject to attachment. This proposition is not tenable. In law an assignment is not effectual, unless the subject-matter of it has actual potential existence. But equity will uphold assignments of contingent interests and expectancies, and things resting in mere possibility, if fairly made, and not against public policy; not as a transfer operating *in præsenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*: *Power's Appeal*, 63 Pa. St. 443; *East Lewisburg L. & M. Co. v. Marsh*, 91 Id. 96.

These assignments are enforced on the ground that the assignee is entitled to have immediate specific performance of the contract to assign as soon as the property comes into existence in the hands of the assignor: *Bispham's Equity*, 215. An attachment execution reaches effects and interests that cannot be taken on a writ of *feri facias*, but it is execution process, and its office is to appropriate the property of the defendant to the judgment which supports it. That which has a present and certain existence, although its possession and

enjoyment may be postponed for a time, may be seized by it, but it cannot grasp expectancies or contingent interests. The consequences of a contrary doctrine are well described by Mr. Justice Green in *Day v. New England Life Ins. Co.*, 111 Pa. St. 507; 56 Am. Rep. 297. The first specification is sustained, and this makes a discussion of the second unnecessary.

Judgment reversed.

ASSIGNMENTS. — The assignment of a mere expectancy will be given effect in equity, not as a grant, but as a contract entitling the assignee to a specific performance as soon as the assignor has the power to perform it: *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434; note to *Field v. Mayor etc. of New York*, 57 Id. 440, 441, as to the assignment of expectancies. Equity will uphold an assignment of wages expected to be earned in the future, but not under an existing employment or contract: *Edwards v. Peterson*, 80 Me. 367; 6 Am. St. Rep. 207, and note 210. The expectation or hope of succeeding to an ancestor's property is a mere or remote possibility in which there is no existing right that can be the subject of release: *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85.

ATTACHMENT. — A policy of life insurance payable to the legal representatives of the insured is not subject to attachment during his life: *Day v. New England Life Ins. Co.*, 111 Pa. St. 507; 56 Am. Rep. 297; note to *Appeal of Elliot*, 88 Am. Dec. 531.

PENNSYLVANIA RAILROAD COMPANY v. MACKINNEY.

[124 PENNSYLVANIA STATE, 462.]

NEGLIGENCE — PRESUMPTION — RAILROADS. — The rule that the mere happening of an injurious accident to a passenger while in the hands of a carrier raises a *prima facie* presumption of negligence, and throws the *onus* of proof on the carrier that it did not exist, cannot be invoked where there is neither proof nor admission tending to connect the carrier or his servants, or any of the appliances of transportation, with the happening of the injury.

NEGLIGENCE — PRESUMPTION — PASSENGER ON RAILROAD. — Where a passenger on a railroad train is sitting at an open window, and observes one of the same company's trains passing in an opposite direction, at the same time receiving a violent blow on the eye from a piece of slate or coal, hurled with considerable force through the window, causing the injury complained of, no presumption of negligence arises against the company or its employees, in the absence of proof connecting them with the throwing of the missile.

George Tucker Bispham and John Hampton Barnes, for the plaintiff in error.

Mayer Sulzberger, for the defendant in error.

STERRETT, J. In May, 1887, plaintiff below was a passenger on one of defendant company's cars, bound for Philadel-

phia. While he was occupying the third or fourth seat from front end of the car, left side, next to an open window, and the train was running rapidly, some distance south of Trenton, he received a violent blow on the left eye, causing the severe and painful injury of which he complains. The nature of the injury indicated that he was struck by some hard substance, hurled with considerable force. Surgical examination of the eye, made on arrival at Philadelphia, showed that it was probably a piece of coal. Small particles of some hard substance resembling coal were found, and removed from the injured organ. Plaintiff testified the blow was so severe that it almost stunned him, and threw him back into his seat. He further said: "As I recovered, to an extent, from the shock, I covered the right eye to see if the sight was entirely lost, as I presumed the blow had burst the left eye. I found I could see a little, but I was suffering excruciating agony." The character of the injury and circumstances attending it were such that plaintiff had no opportunity for successful investigation, and, of course, he was unable to explain how it occurred. All he knew was, that, at the time he was struck, he saw, through the open window at which he was sitting, one of the company's trains passing in the opposite direction, immediately on the left of the train on which he was being carried; that, simultaneously with receiving the blow, the engine of that train was directly opposite the window, and was thus interposed between him and that side of the railroad and land adjacent thereto. That fact, it was claimed by him, negatived any inference that the injury resulted from the act of a stranger, or any one not connected with the operation of the road. His theory was, that a piece of slate or coal was negligently thrown by the fireman or other employee on the passing engine, either in an effort to get rid of it, or in drawing or working at his fire, etc.; but of course that could not be assumed by the court as an admitted or established fact.

While the circumstances in evidence tended to sustain the plaintiff's theory, the cause of the accident was not satisfactorily explained by either party. The company's employees in charge of the train on which plaintiff was testified that they knew nothing of the occurrence, and had done nothing to bring it about. Other employees, in charge of passing trains, testified that they had not drawn or worked at their fires, or thrown off any slate, coal, or any other substance from their engines

or tenders, and that none had fallen therefrom. Evidence was also introduced to prove that all the appliances, machinery, etc., of the road, including the engines, were in good order, and that the latter were properly provided with approved spark-arresters, etc. There was no derailment of the train, no collision with any train or other object on the road, no breaking of any machinery connected with the south-bound train, nor any evidence of anything wrong with the passing trains or cars.

In view of the evidence tending to prove a state of facts such as that above indicated, the defendant company presented four points for charge, in the first and fourth of which binding instructions to find for defendant were asked on the ground that there was no evidence of negligence proper for the consideration of the jury. These points we think were rightly refused. The other two points were as follows:—

“2. Under the circumstances of the present case, no presumption of negligence arises against the defendant from the mere fact that the plaintiff was a passenger, and was injured while riding in the defendant’s cars.”

“3. The burden of proof is on the plaintiff to show that the injury for which he sues was occasioned by the defendant; and, under the circumstances of the present case, the burden resting on the plaintiff is not satisfied by the mere presumption of negligence which sometimes arises against the carrying company when a passenger is injured.”

The learned president of the common pleas also declined to affirm either of these points, and emphasized his refusal by charging, *inter alia*, as complained of in the first specification of error, viz.: “The rule of law, as applicable to this case, is, that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throws the *onus* that it did not exist on the carrier. Under this principle and the facts in this case, the jury will begin their consideration with the fact established that the injuries were the result of negligence of the defendant. This fact must be rebutted or answered by evidence. In other words, the defendant must show by evidence that it was not negligent. If it has not done this, the verdict must be for the plaintiff.” In immediate connection therewith, he said to the jury: “It is your duty, of course, to consider all the evidence in the case, and to come to a conclusion on this question of negligence. If you find that the defendant

was negligent, then the question of damages must be considered by you."

The rule clearly stated by the learned judge in the foregoing excerpt from his general charge is not only an old and well-settled principle of law, but one of very general application in cases of injury to passengers while in the course of transportation. The only question is, whether it is of such universal application that it can be invoked without proof of something more than the mere fact of an injurious accident to a passenger while in the hands of the carrier, and in the absence of any admission or evidence tending to connect the latter, or his servants, or any of the appliances of transportation, with the happening of the injury.

The rule in question has been frequently recognized, and the presumption of negligence applied in a variety of cases, among which are stage-coach accidents, resulting from breaking an axle, etc.; railroad accidents, including derailment of cars, collisions, breaking of machinery, falling of berth of sleeping-car, violent outbreak among other passengers on train; explosion on passenger vessel, etc.: *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. 181; *Ware v. Gay*, 11 Pick. 106; *Hipsley v. Railroad Co.*, 27 Am. & Eng. R. R. Cas. 287; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Edgerton v. Railroad Co.*, 39 N. Y. 227; *Sullivan v. Railroad Co.*, 30 Pa. St. 234; 72 Am. Dec. 698; *Railroad Co. v. Walrath*, 8 Am. & Eng. R. R. Cas. 371; 43 Am. Rep. 433; *Railroad Co. v. Pillow*, 76 Pa. St. 510, 513; *Spear v. Railroad Co.*, 119 Id. 61; *Packet Co. v. McCool*, 8 Am. & Eng. R. R. Cas. 390; *Laing v. Colder*, 8 Pa. St. 479; *Holbrook v. Railroad Co.*, 12 N. Y. 236; 64 Am. Dec. 502; *P. & R. R. Co. v. Anderson*, 94 Pa. St. 351; Story on Bailments, 592, 601; Shearman and Redfield on Negligence, secs. 280, 280 a, and notes.

In nearly every case in which the rule under consideration has been applied, it will be found that the injury complained of was shown to have resulted from breaking of machinery, collision, derailment of cars, or something improper and unsafe in the appliances of transportation or in the conduct of the business, and not from any cause wholly disconnected therewith. In *Laing v. Colder*, *supra*, the plaintiff's arm was broken because the side of the bridge was dangerously close to the side of the track, but in that case there was evidence of contributory negligence, etc. The injury in *Sullivan v. Railroad Co.*, *supra*, resulted from collision of the train with an

obstruction on the track. In *Railroad Co. v. Pillow*, *supra*, the injury was caused by an outbreak of violence among other passengers in the car; and in *Spear v. Railroad Co.*, *supra*, the injury resulted from an unexplained explosion on board a crowded steamer.

In the latter case our brother Williams summarized the controlling facts and applied the rule thus: "The person injured was a passenger; the injury occurred after the carriage had begun, and the cause of the injury was an explosion on the boat, which was the vehicle or instrument of carriage, and which was under the exclusive care and control of the defendant's servants. The rule of law is, that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the *onus* of showing that it did not exist on the carrier." Of course, the rule, as thus broadly stated, must be considered in connection with the facts which warranted its application; and this is so in regard to all the cases. The facts and circumstances connected with the injury complained of in each furnished the basis for a presumption of negligence. As was said in *Railroad Co. v. Napheys*, 90 Pa. St. 135, the general rule undoubtedly is, that the party who alleges negligence as the basis of a claim for damages must prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases slight proof only is required to justify a presumption of negligence. The mere circumstance attending the injury when put in proof may be enough to cast the burden of exculpation on defendant. If a passenger seated in a railroad car is injured in a collision, or by the upsetting of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more, in the first instance, than prove the fact and show the nature and extent of the injury. A *prima facie* case for plaintiff is thus made out, and the *onus* is cast on the carrier to disprove negligence. It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury, and of explaining how it occurred, while as a general rule the passenger is destitute of all knowledge that would enable him to present the facts and fasten the negligence on the company, in case it really existed. The contract to carry implies that the company is provided with a safe and sufficient road; that its cars are stanch and road-worthy; that every precaution

which human skill, prudence, and foresight could suggest has been taken to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, and competent men. When a passenger is injured by any accident connected with the means or appliances of transportation, there naturally arises a presumption that it must have resulted from some negligent act of omission or commission of the company or some of its employees, because, without some such negligence, it is very improbable that the accident would have occurred. That is the basis on which the presumption rests, and it stands as proof of negligence until it is successfully rebutted. It arises, not from the naked fact that an injury has been inflicted, but from the cause of the injury, or from other circumstances attending it. As a rule of evidence the principle was approvingly recognized and applied in *Railroad Co. v. Anderson*, 94 Pa. St. 351, and other cases.

In *Holbrook v. Railroad Co.*, *supra*, a case in some respects similar to the one before us, it appeared that at the moment plaintiff's arm was broken, the passenger-car in which she sat was opposite a boarding-car which had been placed on the adjoining track for the accommodation of the company's workmen. A long horizontal mark on the passenger-car, and other circumstances, indicated that plaintiff's arm, as well as the car, had come in contact with some object of considerable size and strength firmly fixed in its position, and probably connected in some way with the boarding-car, and at the same time tended to negative any inference that the injury could have been caused by a stone or other missile thrown by any person outside. The immediate cause of the injury, however, was not explained. The case having been submitted to the jury with instructions to ascertain from the evidence whether the injury resulted from anything disconnected with the company or not, etc., a verdict in favor of the plaintiff was rendered. After stating the general rule as to the burden of proof, etc., the court of appeals said: "It generally happens however, in cases of this kind, that the same evidence which proves the injury done proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad-car. This mere fact is no evidence of negligence on the part of the carrier until some-)

thing further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car, and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. It is incorrect, therefore, to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the cause of the injury, or from other circumstances attending it, and not from the injury itself."

It follows from what has been said that the learned judge of the common pleas erred in directing the jury to begin their consideration of the case "with the fact established that the injuries were the result of negligence of the defendant." If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employees had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist.

Judgment reversed, and a *venire facias de novo* awarded.

NEGLIGENCE.—The mere happening of an injurious accident to a passenger raises a *prima facie* presumption of negligence, and throws upon the carrier the *onus* of showing that negligence did not exist on its part: *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533. And where a passenger is injured without his fault, by a train being overturned by running over a cow, the presumption of negligence which the law raises against the company remains in force until a countervailing presumption of fact is established to the satisfaction of the jury: *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698, and note 702. But negligence is not presumed from the mere fact alone that a passenger was injured; but the passenger suing for damages must prove that the circumstances attending the injury were such as raise a reasonable presumption that it was caused by some fault or want of care on the part of the company's servants: *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; 64 Am. Dec. 502; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720. The happening of an accident on a railway train does not in all cases warrant a recovery by one receiving an injury; but if the thing causing the injury is shown to be under the control of the defendant, and the acci-

dent is such as in the ordinary course of business does not happen where reasonable care is used, the negligence of the railway company is presumed in the absence of any evidence tending to show that the accident did not arise from want of care on the part of the injured passenger: *Breen v. New York C. etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450, and note 452. A carrier of passengers, whether by street-cars drawn by horses, or by steam-cars from city to city, is bound to use extraordinary care and diligence; and where a passenger is hurt by reason of its carriage, the presumption is always against the carrier: *City and Suburban R'y v. Findley*, 76 Ga. 311.

SUSQUEHANNA MUTUAL FIRE INS. CO. v. ELKINS.

[124 PENNSYLVANIA STATE, 484.]

INSURANCE — WAIVER OF BY-LAWS. — Where the by-laws and conditions of a mutual insurance company provide that all general or local agents shall be appointed by the secretary, and furnished with a certificate of appointment under seal setting forth their powers, and no insurance, whether original or continued, shall be considered binding, unless the premium shall have been actually paid to some duly authorized and commissioned agent, such by-laws and conditions are solely for the benefit of the insurer, and may be waived, and are waived, when he authorizes his agent to deliver a policy and receive the premium, though such agent has not been duly authorized and commissioned as provided in the by-laws. Such a course of dealing adopted between the insurer and his agent, though wholly inconsistent with the provisions of the policy, cannot be set up to defeat a recovery.

James C. Sellars, David Fleming, and S. J. M. McCarrell,
for the plaintiff in error.

Alexander P. Colesberry, Charles B. McMichael, and Frank R. Shattuck, for the defendant in error.

CLARK, J. This suit is upon a policy issued by the defendants December 10, 1880, to William L. Elkins & Co. against loss by fire on the Belmont Oil Works, to the amount of \$1,575. The contract covered a term of one year from December 1, 1880; the fire occurred March 9, 1881, and the loss apportioned to this policy is \$710.36; as to this there is no dispute.

The policy contained stipulations that the company should not be liable on the policy, or on any renewal thereof, until the premium therefor was actually paid and the deposit made; that if the premium was paid to any person other than the duly appointed or authorized agent of the company, such payment should be at the sole risk of the assured, and that nothing less than a distinct specific agreement, clearly expressed and indorsed on the policy, should be construed as a waiver of "any printed or written condition or restriction therein."

The policy was sent to Crane for delivery to Elkins; the secretary himself says that Crane had the right to deliver the policy, and to collect the premium; to this extent, at least, Crane represented the company, for the contract was incomplete until the policy was delivered. Mr. Crane testifies, however, that he was the agent of the company for certain purposes. He says the secretary called to see him, and it was arranged that he should send business to the company; that in pursuance of the arrangement, he did send applications for insurance, subject to their approval; that they wrote up the policies and sent them to him as their agent and representative; that it was part of the understanding that he was personally liable to the company for the premiums on policies sent to him, and that the company looked to him for these premiums, or for a return of the policies; that he credited the company in an account with the policies received, or charged himself with the premiums, and that the company and he settled about the 15th of every month. All this was explicitly and positively denied by Huntzinger, the secretary of the company, who says that Crane was not the agent of the company for any purpose whatever; but the veracity of the witnesses and the conflict in the testimony was for the jury, and adopting the verdict as a finding of the fact, it cannot now be questioned that Crane was an agent of the company, "duly appointed or authorized," to deliver the policy and receive the premium.

But the company has offered in evidence certain by-laws of the company, with reference to which the policy was made and accepted, as follows:—

"Sec. 10. All general and local agents or surveyors shall be appointed by the secretary, and shall be furnished with a certificate of his or their appointment, with the seal of the company affixed thereto, setting forth the powers of such agents, and without said certificate no person shall be or is authorized to act as agent for this company."

"Sec. 24. No insurance, whether original or continued, shall be considered as binding until the cash premium shall have been actually paid to some duly authorized and commissioned agent of the company."

"Sec. 42. These and all other by-laws hereafter adopted shall not be abrogated, modified, or in any wise altered or added to, unless at a regular meeting of the board of directors; and all by-laws heretofore adopted by this company and inconsistent herewith are hereby repealed."

Whilst these by-laws are declared to be part of the contract, they are not any part of the "printed or written conditions or restrictions therein," which, according to the seventh condition of the policy, can be waived only by a distinct, specific agreement, clearly expressed and indorsed on the contract; the seventh condition of the policy plainly refers, and refers only, to a waiver of any condition, printed or written in the body of the policy. If Mr. Crane, therefore, was an agent of the company "duly appointed and authorized" to receive premiums on policies delivered by him, it involved no waiver of any condition contained in the policy itself to bind the company by his act in so doing.

It is argued, however, that as the company is a mutual company, the plaintiffs are presumed to be acquainted with the by-laws, and therefore had notice by the 24th section that his insurance was not binding until the cash premium was actually paid to some duly authorized and commissioned agent of the company. The by-laws were made, however, solely for the protection of the company, and as we said when the case was here before, the company was not bound to adhere to them. If they chose to dispense with the protection thus offered, it was competent for them to do so. If the company had issued this policy to Elkins, and expressly agreed to give him time on the payment of the premiums, taking his promissory note for the amount thereof, payable at a future day, it would not be pretended, we think, that because the premium was not actually paid, there was no liability in case of loss during the period of credit. Or if the company had placed the policy in the hands of some person expressly for delivery with instructions to receive the premiums, and the premium was paid and the policy delivered accordingly, it would certainly not avail the company anything in case of loss that the premiums had not been paid to "a duly authorized and commissioned agent of the company." These by-laws were made solely in the company's interest, and it was competent for the company in a particular case to waive strict adherence thereto.

If, notwithstanding these by-laws, the company actually authorized Mr. Crane to act for them in delivering this policy, in receiving premiums thereon, and adopted a course of dealing with him wholly inconsistent with its provisions, they cannot now set them up to prevent the plaintiff's recovery. This case is readily distinguishable from *Marland v. Royal Ins. Co.*, 71 Pa. St. 393; *Schaffer v. Mutual Fire Ins. Co.*, 89 Id. 296;

Greene v. Lycoming Ins. Co., 91 Id. 387; and *Pottsville Ins. Co. v. Improvement Co.*, 100 Id. 137; cited and relied upon by the plaintiffs in error. In each of these cases the company rested upon the positive provision of the policy that it was not to be binding until the actual payment of the premium, and in none of them was the premium paid, or pretended to be paid, either to the company or to any of its agents. In this case, however, the agency of Crane was established by proofs satisfactory to the jury, and there was evidence from which the jury was justified in inferring that the company authorized the delivery of the policy, and accepted the responsibility of their agent in lieu of the security afforded by this provision of the policy.

The judgment is affirmed.

INSURANCE. — The general agent of an insurance company has the power to waive conditions in the policy inserted for the benefit of the company: *Kruger v. Western Fire Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note.

PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD Co. v. WALSH.

[124 PENNSYLVANIA STATE, 544.]

RAILROADS — CONSEQUENTIAL INJURY FROM CONSTRUCTION. — Plaintiff is entitled to consequential damages arising from the construction and operation of a railroad when the track is laid so close to the curbstone on the side of the street next to his property as to render the means of access thereto dangerous or cut off entirely, and this though the track was laid on the public street under authority, and no land was taken from plaintiff, nor the grade of the street changed, nor negligence on the part of the company in constructing and operating the road.

C. H. Stinson and Wayne Mac Veagh, for the plaintiff in error.

John G. Johnson and Charles Hunsicker, for the defendants in error.

PAXSON, C. J. While there are numerous assignments of error in this case, the fifth presents the only question which requires discussion. The defendant below asked the court to instruct the jury that "there can be no compensation for injury to persons or property unaccompanied with negligence, arising from the operation or use of the defendant's railroad, constructed on a public street in the borough of Norristown, and so authorized by law, when no land is taken from the

plaintiffs, nor the grade of the street changed by excavation or embankments by the defendant in front of the plaintiff's premises, as distinguished from its construction, and if the jury does not find negligence on the part of the defendant causing such injury, the plaintiffs are not entitled to a verdict"; which point the court below answered as follows: "Refused; it is true that the ordinary and proper use of a railroad cannot be regarded as an element of damage, unless the construction of the railroad interferes with the property of the plaintiffs; but we cannot say that if the jury find that this railroad is not negligently operated, they must find a verdict against the plaintiffs."

The plaintiffs below are the owners of a certain property situated in the borough of Norristown, having a front of about 196 feet on Lafayette Street. Upon this property there is a church building about thirty feet back from said street, in the rear basement of which is a school-room; a parsonage about forty feet back from said street, and three tenement-houses on the line of said street. The defendant company has constructed its railroad upon Lafayette Street, and has laid its tracks close to the curbstone in front of said church, parsonage, and tenement-houses, and has since continuously and constantly run locomotives and trains of passenger and freight cars over said tracks. This action was brought in the court below for damages arising from the erection and construction of the defendant's road; the allegation being that said street or highway is "obstructed, closed, and destroyed, and all access to the front of said messuage and tenement, parsonage, church edifice, and school is prevented, cut off, and taken away, and the same rendered difficult and dangerous of approach, and the said parsonage, church edifice, and school rendered unfit and unsafe for use as a parsonage, church, and school, and their value wholly and totally destroyed."

We have recently discussed so fully the question of consequential injuries resulting from the erection and construction of railroads that a further elaboration of the subject is deemed unnecessary. Our latest case is *Pennsylvania Railroad Co. v. Marchant*, 119 Pa. St. 541, in which it was held that the word "injury" or (injured), as used in section 8, article 16, of the constitution, means such a legal wrong as would be the subject of an action for damages at common law; that for such injuries both corporations and individuals now stand upon the same plane of responsibility. In that case, as in the prior

case of *Railroad Co. v. Lippincott*, 116 Pa. St. 472, there was no injury to the property by reason of the erection and construction of the road, and we held that the constitutional provision was not intended to apply to injuries which were the result merely of the operation of the road, as distinguished from its construction, and that in such case there could be no recovery for the annoyance of smoke, noise, and cinders, etc., caused by the running of the company's trains, unaccompanied with negligence; in other words, that the injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence and without malice, are *damnum absque injuria*. We cannot, however, apply that rule to this case, for obvious reasons.

In *Railroad Co. v. Lippincott*, and *Railroad Co. v. Marchant*, *supra*, as in this case, there was no actual taking of any portion of the plaintiffs' property. But there the analogy ceases. In the cases cited, there was no injury by reason of the construction of the road; here there was an injury, and a serious one, the direct result of the construction. The track was laid close to the curbstone, on the side of the street next to the plaintiffs' property, by means of which the access thereto, if not actually cut off, was rendered dangerous. In this respect the case is upon all fours with *Railroad Co. v. Duncan*, 111 Pa. St. 352, and *County of Chester v. Brower*, 117 Id. 647.

It was urged, however, that the mere laying down of the tracks in front of the plaintiffs' property was not of itself any injury; that it was a benefit, in view of the fact that the street had been greatly improved by having been repaved with Belgian blocks in a superior manner, and that the injury was solely the result of the use and operation of the road. This is plausible, but unsound. Where the question is the obstruction of access to a property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in *Railroad Co. v. Marchant*, *supra*. It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road. No authority for such a proposition can be found in anything this court has ever said. We are of opinion that in the case in hand there was an injury arising from the erection and construction. This being so, it stands upon the same

footing as to consequential injuries as if it had been an actual taking of a portion of the plaintiffs' property.

Judgment affirmed.

EMINENT DOMAIN — DAMAGES: See *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659; and Justice's Sterrett's dissenting opinion, with notes, page 669; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472; 2 Am. St. Rep. 618, and note 623, both of which cases are cited and distinguished in the principal case.

EMINENT DOMAIN — CONSEQUENTIAL DAMAGES. — Where a railroad track is so constructed with reference to abutting property that by its lawful operation the drainage is interfered with, and access to the property rendered dangerous, the company is liable for consequential damages under the provisions of the constitution of the state of Pennsylvania: *Pennsylvania S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560; and tending to the same effect is *County of Chester v. Brower*, 117 Id. 647; 2 Am. St. Rep. 713.

GREENWOOD v. PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY.

[124 PENNSYLVANIA STATE, 572.]

RAILROADS — INJURY AT CROSSING — NEGLIGENCE. — Where in an action to recover for injuries received at a railroad crossing it appears that the company had for some time kept a watchman and safety-gates there, which were lowered upon the approach of trains, but upon the night when the accident happened they were not lowered, as they had become out of order in the morning, and had not been repaired; that the watchman displayed no light and gave no warning; that a horse-carriage, as it approached the crossing, did not stop, nor even slacken its speed, in order to afford an opportunity to look and listen, but continued on, was struck by the train, and the plaintiff thus thrown from the carriage and injured, — he is not entitled to recover, because of his contributory negligence in failing to "stop, look, and listen" before attempting to cross the track.

RAILROADS — DUTY OF TRAVELER AT CROSSING. — The rule requiring one to "stop, look, and listen" for trains before attempting to cross the track is a clear and certain rule of duty, as applicable in towns and cities as in the country, and a departure from it is more than evidence of negligence: it is negligence *per se*.

J. B. and J. H. Hinkson, for the plaintiff in error.

William Ward, for the defendant in error.

PAXSON, C. J. The plaintiff brought this action in the court below to recover damages for injuries received by him, and which he claims were caused by the negligence of the defendant company. The court below gave a binding instruction to the jury to find for the defendant. Under such circumstances,

we must assume, not only that all of the plaintiff's testimony is true, but that he is entitled to every inference fairly to be drawn from it.

The facts of the case, as we gather them from the evidence, may be briefly stated as follows: The plaintiff was a member of the Hanley Hose Company, in the city of Chester. On the night of March 26, 1887, he was at the hose-house, and informed one or more members that there was a fire; to use his own language: "It looked from Edgmont Avenue to be over at Mr. Eyre's house, around Seventh Street. That is where I seen the fire." No other person in Chester appears to have seen this alleged fire; nor was there any alarm given at any of the other engine-houses. The result of the plaintiff's announcement at the Hanley Hose Company's house was that the company immediately turned out. The plaintiff and one or two others got on the hose-carriage, and with a spirited horse started out to find the fire. The horse was driven at a rapid rate of speed for some distance along Fifth Street, and then turned up Welsh Street. The railroad of the defendant company was one square from the corner of Fifth and Welsh. At the railroad crossing the company had for some time kept a watchman, and safety-gates, which were lowered upon the approach of trains. Upon the night in question, when the hose-carriage approached the crossing, the gates were not lowered; they had become out of order that morning, and had not been repaired. The watchman displayed no light and gave no warning. The hose-carriage did not stop as it approached the track, in order to afford an opportunity to look and listen; nor did it even slacken its speed, but continued on, was struck by the train, and the plaintiff was thrown off the carriage and injured.

Under such circumstances, does the case come within the familiar rule, "stop, look, and listen"? It was strongly urged upon the argument that the rule referred to does not apply, for the reason (a) that the plaintiff had a right to rely upon the fact that the safety-gates were up, and (b) that the said rule is not applicable to towns and cities where trains are constantly crossing streets.

I do not understand the law to be that when a railroad company adopts safety-gates, or any other appliance for the protection of the public, that the public are thereby absolved from the duty of taking any care of themselves. Conceding that the company was required to take extra precautions by

reason of the gates being out of order, yet the plaintiff was also bound to do his part. He has no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up. Machinery of all kinds is liable to get out of order, and may do so just at the critical moment of the approach of a train. In all such cases, the safety of the traveling public requires that each party shall be held to the exercise of due care. Had this horse-carriage stopped near the crossing instead of rushing on at reckless speed, this accident would not have happened. The train could have been seen for one hundred feet before the crossing was reached. If the rule to stop, look, and listen were always observed, an accident at crossings, now so frequent, would rarely occur, whether in town or country. It is difficult to see why the rule is not as important in towns and cities as in the country, where in many instances the track can be seen for a long distance. The rule itself is so valuable, is sustained by such abundant authority, and is, moreover, founded upon such excellent common-sense reasons, that we will neither depart from it, nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence: it is negligence *per se*.

I have not referred to the question of the city ordinances; for, conceding the negligence of the defendant company, the plaintiff was guilty of such contributory negligence as bars his right to recover. Nor have I discussed the numerous cases cited, as but few of them have any application to the peculiar circumstances of this case.

Judgment affirmed.

RAILROAD TRACK — NEGLIGENCE. — A railroad track itself is a warning of danger to all who go upon it, and a person about to cross it is bound to look and listen, if by so doing he can discover the proximity of a moving train, and the omission to do so is an omission of ordinary care, which will prevent his recovery for an injury which might have been avoided if he had used his faculties of sight and hearing: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and cases cited in note 813. A person walking on a railroad track must look and listen for approaching trains, and his failure to do so is negligence of the grossest nature, and defeats his right to recover for injuries sustained, unless there is a want of reasonable care on the part of the employees of the company after becoming aware of the perilous situation of the party injured: *State v. Baltimore etc. R. R. Co.*, 69 Md. 494; 9 Am. St. Rep. 436, and note 442; and see note to *Dickson v. Hollister*, ante, p. 536, for care required of pedestrians.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BANK v. BUCHANAN.

[87 TENNESSEE, 52.]

PAYMENT IN FORGED PAPER, SPURIOUS BILLS, OR IN BASE COIN IS VOID, and leaves the original debt in full force and effect, where there has been no fraud nor improper conduct on the part of the payee, alike whether it be received in payment of an antecedent debt or for goods or other present consideration.

PRINCIPAL AND SURETY. — SURETIES ON NOTE ARE NOT DISCHARGED FROM LIABILITY where the payee surrenders the note, and accepts in renewal another note, to which the insolvent principal has forged the names of other sureties, no bad faith or negligence on the part of the payee being shown. The fraud of the principal, without participation of the creditor, will not release the sureties.

W. D. Henderson, for the bank.

W. L. Harbison, for the defendants.

FOLKES, J. This is a bill by the bank to recover of Hale and Carver the sum of eighty-five dollars, being the amount of a note made by Buchanan, Hale, and Carver, jointly, and discounted by the bank for the benefit of Buchanan, the other makers being, as between the parties, sureties for Buchanan, credit being given solely to Hale and Carver.

At its maturity, said note was surrendered and canceled upon the delivery to the bank by Buchanan of another note for the same amount, purporting to be executed by said Buchanan, and McKamy and Bond, which was accepted by the bank in renewal of the first note. The last note was surrendered and canceled at maturity, upon the delivery to the

bank of a note for \$275, purporting to be executed by Buchanan, McKamy, and Bond; this note being taken in renewal of the second note for \$85, and for the advance or loan of the difference between the face of the note and the \$85. Upon default being made in the payment of the last note, and proper steps being taken to collect the same, it was developed that the signatures of McKamy and Bond were forged to both notes upon which their names appeared, and that Buchanan had fled the country.

This suit is now brought to recover the amount of the principal and interest on the genuine note of Buchanan, Hale, and Carver, upon the ground that the note of Buchanan, McKamy, and Bond, taken in renewal thereof, being a forgery, was absolutely void, and not operative as a satisfaction and discharge of the debt represented by the genuine note.

The chancellor gave decree for complainant, and defendants Hale and Carver have appealed.

For appellants, it is insisted that the debt sued on has been paid off and discharged, and that the extension of time given to the principal debtor by the acceptance of renewal notes operated to discharge them as sureties.

There is no error in the decree. It is well settled that payments in forged paper, spurious bills, or in base coin is void, and leaves the original debt in full force and effect, where there has been no fraud nor improper conduct on the part of the party receiving such forged paper, alike whether it be received in payment of an antecedent debt or for the payment of goods or other present consideration: See *Anderson v. Hawkins*, 3 Hawks, 568; *Ramsdale v. Horton*, 3 Pa. St. 330.

In *Ware v. Street*, 2 Head, 609, this principle is announced, although it was not the point adjudged in the case, the question there being as to the solvency, not the genuineness, of certain bank notes given in payment of a debt.

This announcement being distinctly recognized in *Wright v. Overall*, 2 Cold. 345, in *Naff v. Crawford*, 1 Heisk. 124, and in *Kirtland v. M. & T. R. R.*, 4 Lea, 421, although in these cases, as in the first, it was not the point decided. See also *Box v. McKelvey*, 8 Heisk. 861.

In *Allen v. Sharpe*, 37 Ind. 68, 10 Am. Rep. 80, the case is made substantially as presented here, and decided in the same way. To the same effect is *Ritter v. Singmaster*, 73 Pa. St. 400.

There being no pretense of bad faith, or any negligence or

improper conduct on the part of the bank, the fact that these defendants were sureties can make no difference, it being equally as well settled that the fraud of the principal, without participation of the creditor, will not release the sureties: *McNairy v. Marshall*, 7 Humph. 229; *Hubbard v. Fravell*, 12 Lea, 304.

Let the judgment be affirmed, with costs.

INDORSER — FORGERY. — Where appellant, for M.'s accommodation, indorsed his note, which was discounted by appellee, who knew it to be an accommodation note, and at its maturity M. presented a second note, purporting to have appellant's indorsement thereon, which was accepted in good faith by the appellee as a substitute or renewal of the first note, M. being insolvent, and appellant's indorsement on the second note being a forgery, appellant was not discharged from his liability upon the first note: *Allen v. Sharp*, 37 Ind. 67; 10 Am. Rep. 80; note to *Coggill v. American Exchange Bank*, 49 Am. Dec. 315. The receipt of a new promissory note, a signature to which is afterward found to be forged, does not operate as a payment of the original note or an extinguishment of the right of action thereon: *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281. Payment in worthless paper is not a valid payment; and one receiving such bills, without fault or negligence on his part, in payment of a pre-existing debt, may treat the payment as void, and resort to his original cause of action: *Gilman v. Peck*, 11 Vt. 516; 34 Am. Dec. 702, and note 704. Payment by a forged note does not extinguish the debt: *Eagle Bank v. Smith*, 5 Conn. 71; 13 Am. Dec. 37. Where the vendor sold and delivered cattle, and received payment in bank notes, which he afterwards paid away to a third party, who discovered one of the notes was forged, neither the vendor nor the vendee knowing of the forgery, in an action by the vendor against the vendee on the original contract for cattle sold and delivered, it was held that a forged note or bill was no payment, and the party might treat it as a nullity, and resort to the original contract: *Markle v. Hatfield*, 2 Johns. 455; 3 Am. Dec. 446, and cases cited in the opinion to said case. But a banker who receives a forged check in payment, and keeps it for two months, without giving to the *bona fide* holder from whom he received it notice that it was forged, must bear the loss: *Bank of St. Albans v. Farmers' etc. Bank*, 10 Vt. 141; 33 Am. Dec. 188, and note 192, 193.

LIABILITY OF SURETY WHEN THE NAME OF THE PRINCIPAL OR CO-SURETY IS FORGED: See monographic note to *Reed v. Morton*, 8 Am. St. Rep. 246, 247. When the name of one maker of a joint note has been forged, another maker, although only a surety, and signing in the belief that the forged name is genuine, is nevertheless bound to an innocent payee: *Helms v. Wayne Agricultural Co.*, 73 Ind. 325; 38 Am. Rep. 147.

JACKSON v. MEEK.

[87 TENNESSEE, 69.]

CORPORATIONS. — AT COMMON LAW, EACH SHARE-HOLDER OF CORPORATION IS LIABLE for the debts of the corporation only so far as he may have agreed to contribute to the capital stock. His liability is in his corporate capacity, and is deemed the primary source for the payment of the company's debts.

CORPORATIONS — INDIVIDUAL LIABILITY OF STOCKHOLDER. — Each stockholder upon becoming such in a corporation with an individual-liability clause in its charter does so with the understanding that he will not be held to pay individually, until the corporate assets have been found to be insufficient.

CORPORATIONS. — UNDER TENNESSEE STATUTE, ACTS OF 1875, CHAPTER 142, SECTION 21, STOCKHOLDERS IN CERTAIN CORPORATIONS ARE MADE INDIVIDUALLY LIABLE, in addition to the liability of the corporation, for the wages of servants and employees that may be earned in the company's service, and an employee does not by taking a note and obtaining judgment against the corporation for such wages, and by receiving *pro rata* on his claim out of the corporate assets, waive his rights against the individual share-holders.

CORPORATIONS. — STOCKHOLDERS CANNOT BY TRANSFER OF THEIR STOCK RELIEVE THEMSELVES from their individual liability to servants or employees for wages previously earned in the service of the corporation.

Cooper and Frame, for the appellant.

L. A. Gratz, for the respondent.

TARVER, Special Justice. The facts of this contention necessary to be stated are as follows:—

The Chronicle Company was regularly incorporated a body politic and corporate in January, 1883, under the act of the legislature entitled "An act to provide for the organization of corporations," approved March 23, 1875, and section 21 of said act. The defendant, Meek, was one of its charter members, and continued a stockholder therein down to November, 1885, when he disposed of his stock. Plaintiff, Jackson, also owned some stock in the Chronicle Company, but disposed of it before defendant, Meek, parted with his stock. Jackson was in the service of the company from February, 1885, to the following June, at a salary of twelve dollars per week. In December, 1885, Jackson had settlement of his wage account with the company, when it was found that there was due him thereon \$199.17; he receipted the pay-roll of the company, but received no money, and took the company's note for the amount due him for wages. While in the company's service Jackson loaned it \$350, and took its note therefor.

In May, 1886, Jackson took a justice of the peace's judg-

ment for the aggregate of his two notes against the company, and afterward, in same month, on his own petition, Jackson was made a party to proceeding in the chancery court to wind up the Chronicle Company as an insolvent corporation, and received his *pro rata* upon said judgment, which was about twenty per cent.

April 11, 1888, Jackson took a justice of the peace's judgment against defendant, Meek, for \$112.17, it being the balance of his claim for wages, after being credited with its *pro rata*, and fifty dollars paid by a share-holder of said company.

Meek appealed from this judgment to the circuit court, where there was a trial before the judge without the intervention of a jury, and judgment in his favor, the trial court holding that Jackson was estopped by taking the company's note for his wages, and his subsequent efforts to collect from the corporate assets.

Is there reversible error in the ruling of the trial court?

The general rule of the common law holds the share-holder of a corporation liable for the debts of the association only so far as he may have agreed to contribute to the capital stock of the company; his liability is in his corporate capacity, and is deemed the primary source for the payment of the company's debts. But our legislature has superadded to this common-law liability in corporate capacity an individual liability upon the share-holders of all corporations incorporated under the twenty-first section of the act of 1875, in favor of journeymen, servants, and employee's wages that may be earned in the company's service; this liability is regarded as a secondary source for the payment of the debts provided for. Each wage-earner of the Chronicle Company had two sources for the payment of his debt; first, the corporate assets, and second, the individual stockholders.

The current of adjudged cases in other states seem to hold that each stockholder upon becoming such in a company with this individual-liability provision does so with the understanding that he will not be held to pay individually until the corporate assets have been found to be insufficient. We assent to the soundness of this proposition: Morawetz on Private Corporations, secs. 869 et seq.; Thompson on Liability of Stockholders, sec. 334.

It follows, therefore, that the plaintiff, Jackson, in seeking to collect his debt for wages, in the first instance, from the assets of the Chronicle Company, was in the line of duty, and

certainly not thereby estopping himself from afterward availing himself of the benefits secured him by the individual-liability clause of the charter, and that the trial judge is in error, and his judgment should be reversed.

But it is insisted that the defendant, Meek, having parted with his stock in November, 1885, some two years before the suit against him before the justice was commenced, his individual liability for the plaintiff's debt for wages ceased to rest on him, and passed over to his transferee, to whom the plaintiff must now look. Is this correct? When the wage-earners were in the employ of the Chronicle Company, and contracted with it,—contracted upon the faith of this individual-liability clause,—the offer of the share-holder contained in the clause in question being accepted by the "servants and employees" of the company, ripens into a binding contract. This binding contract was upon these share-holders who were such at the time the service was rendered.

This individual liability, when ripened into a binding contract, is beyond the control of the company or its officers; none but those for whose benefit the provision was made can release the contract. To hold differently would practically destroy this provision for the wage-earner's benefit. When the share-holder sees the approaching insolvency of the corporation, he has only to make transfer of his stock to a straw man, fold his arms, and let the crash come. We hold that the legislature did not intend to place the life of this security in the hands of the share-holder, but designed it to be a security, the burden of which cannot be shifted by the share-holder to another, to the prejudice of the wage-earner, without his concurrence.

If material, it is not shown to whom the defendant Meek's stock was transferred, whether to one able to discharge the liability for wages, nor whether transferred in good faith.

Under the facts of the case, the defendant, Meek, has not relieved himself of liability, under the clause, to the plaintiff.

The judgment of the court below is reversed, and the plaintiff will have judgment here against the defendant, Meek, for the amount of the justice's judgment, with interest, and for all the cost of the cause.

LIABILITY OF STOCKHOLDERS OF CORPORATIONS: See full and exhaustive monographic note to *Thompson v. Reno Bank*, 3 Am. St. Rep. 806-873; *Marshall Foundry Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539; *Schalucky v. Field*, 124 Ill. 617; 7 Am. St. Rep. 399.

PRATER v. PRATER.

[87 TENNESSEE, 78.]

EXEMPTIONS. — EXEMPTION LAWS OF TENNESSEE WERE ENACTED for the protection of citizens of that state only, and non-residents cannot avail themselves of their benefit.

HUSBAND AND WIFE — DOMICILE. — As a general rule, the domicile of the husband is, in contemplation of law, the domicile of the wife; but there are exceptions to the rule, as where the wife voluntarily absents herself, under circumstances amounting to a wrongful abandonment of the husband, and permanently resides in another state.

HOMESTEAD — WIFE'S FORFEITURE OF RIGHT TO HOMESTEAD IN HUSBAND'S PROPERTY. — A woman who, without cause, voluntarily and permanently deserts her husband and home, and elopes with another man, and lives with him in another state in continuous lewd intercourse for a long period of years, and until her deserted husband's death, forfeits all right, as widow, which she may ever have had to homestead in lands owned by the husband at his death.

Taylor and Hood, for the complainant.

Wat. M. Cocke, for the defendant.

CALDWELL, J. This is a bill for dower and homestead. The chancellor refused the claim of dower, but allowed that of homestead. Complainant acquiesced in the decree, but the defendant has, by writ of error, brought to this court for revision so much of it as adjudged complainant entitled to homestead.

It is alleged in the bill and admitted in the answer that complainant, Margaret Prater, and Ambrose Prater intermarried "many years ago" in this state, and lived here together as man and wife for "several years"; that thereafter they were separated for a long period of time, and never lived together again; that at the time of his death, in January, 1887, and for about five months previous thereto, he was cohabiting with the defendant, Laura, as his wife; that he died without issue, and testate, having bequeathed and devised the whole of his very small estate to the defendant, whom he, in his will, called his "beloved wife"; that the defendant has, since his death, continued to reside upon and claim, as devisee, the only real estate he left, being a house and lot in Knoxville, occupied by him and her as their home at the time of his death; and finally, that complainant, insisting upon her rights as the lawful widow, had formally dissented from the will before she filed this bill.

It is further alleged in the bill that Ambrose Prater, while

living with complainant as his wife, became enamored of another woman (not the defendant), cohabited with and had several children by her; that this caused the separation between him and complainant, and that thereafter he pretended to marry the defendant, and did live and cohabit with her as his wife until his death, though they both knew that complainant was still "alive, and the lawful wife of Ambrose Prater."

The defendant, in her answer, says that she was married to the deceased in August, 1886; that he always represented to her that he had been legally divorced from the complainant; and she positively denies that she knew that complainant still claimed to be the lawful wife of Ambrose Prater.

She says, further, that she has no knowledge of the alleged improper relations of Ambrose Prater with the woman referred to in the bill, but she denies that such was the cause of the separation. She says, on the contrary, that complainant herself became grossly unfaithful, and committed "repeated acts of adultery" with John Huchison and other men; that she abandoned Ambrose Prater, and took up her abode with said Huchison, and lived with him in the city of Knoxville for a time, after which, in the year 1881, she eloped with said Huchison, and went with him to Ashville, North Carolina, where they continued to live and cohabit as man and wife, and where they still so live and cohabit, "unless they have recently removed" to some other place, and that the deceased acquired the house and lot in which complainant seeks to set up rights of homestead and dower long after the separation from complainant, and when he believed that he had been lawfully divorced from her and legally married to the defendant.

The answer concludes as follows: "Now, therefore, the complainant, at the time of the death of the deceased, not being a resident of this state, but a citizen of the state of North Carolina, and having, more than fifteen years before, left the domicile and abandoned the home of the deceased of her own cause, and without any fault of the deceased, and having eloped and lived in adultery with said John Huchison for these ten years, she is, in consequence thereof, forever debarred from dower and homestead in the real estate of the deceased."

Complainant set the cause for hearing upon bill and answer, and thereby, under a familiar rule of chancery practice, admitted the truth of the answer. Upon the record thus

made up, the chancellor heard the cause, with the result already stated.

There being no appeal from the decree as to dower, the question for our decision is, whether or not the complainant is entitled to homestead under the facts of this case. We think she is not, for more reasons than one.

1. The complainant is a non-resident of this state, and being such, is not entitled to the benefit of our exemption laws.

It is true that she states in the caption of her bill that she is a resident of Blount County, Tennessee; but that statement is not established by proof nor admitted in the answer.

On the other hand, it is distinctly stated in the answer that complainant was a non-resident of this state, and a citizen of North Carolina, when Ambrose Prater died, which was less than twelve months before the filing of the bill; and again, that she and Huchison resided in Ashville, in the latter state, from 1881, and were still residing there when the answer was filed, in February, 1888, "unless they have recently removed" to some other place.

These statements, which are taken as admitted to be true, establish the non-residence of complainant. They show that her residence was in another state when Ambrose Prater died; that it had been there for many years prior to his death, and that it was still there when the answer was filed, unless recently changed.

The place of residence, being once established, is presumed to continue until a change is shown to have been made. In this case, the burden of showing change is upon the complainant, yet she has offered no proof whatever upon the subject.

The allegation of residence in Tennessee, made in the caption of the bill, is not evidence of a change of residence from North Carolina to this state; yet that is all that appears in this record to overcome the facts and presumption just mentioned, and to sustain the argument of counsel for complainant that she is in fact a citizen of this state.

It has long and uniformly been held by this court that our exemption laws were enacted for the protection of citizens of this state only, and that non-residents cannot avail themselves of their benefit.

It was so held as to personalty in *Hawkins v. Pearce*, 11 Humph. 45, and in *Lisenbee v. Holt*. 1 Sneed, 50; and as to claim of homestead in *Emmett v. Emmett*, 14 Lea, 370.

The Emmett case is particularly in point, for in that case, as in this, the claimant was the non-resident widow of a man who was a citizen of this state, and who died here in the possession and occupancy of the property in which the claim of homestead was asserted. In that case the claim was refused by this court alone upon the ground that the claimant was a non-resident.

In its moral aspect that was a much stronger case for the allowance of homestead than this is. There the husband had abandoned the wife, while here the wife abandoned the husband.

The fact that Ambrose Prater was a citizen of this state and entitled to homestead at the time of his death does not help the complainant's case, or make her any the less a non-resident.

We concede that, as a general rule, the domicile of the husband is, in contemplation of law, the domicile of the wife; but, of necessity, there are many exceptions to that rule. This case furnishes a striking exception, and forcibly illustrates the injustice that would flow from a universal application of the rule.

No effect was given to this rule in the Emmett case, just mentioned. In fact, it was not referred to at all in that case, but the real residence of the wife was treated as controlling. So we treat it in this case.

With respect to the unity of domicile as bearing upon the homestead right, Judge Thompson says: "But as the domicile of the husband draws with it the domicile of the wife, the fact that a wife remains out of the state with the consent and approval of her husband has been held not to preclude her, after his death, from asserting a homestead right in his estate, as against his creditors. But it is otherwise if the absence was voluntary on the part of the wife, amounting to a wrongful abandonment of the husband": Thompson on Homesteads and Exemptions, sec. 91; citing *Lacey v. Clements*, 38 Tex. 661, and *Earle v. Earle*, 9 Tex. 630.

It has also been held that a wife is not entitled to homestead in the lands of her husband acquired in another state by him after deserting her and their children, she never having resided in the latter state: *Stanton v. Hitchcock*, 64 Mich. 316.

2. Taking the answer of defendant to be a correct history of the life and conduct of complainant since her marriage with

Ambrose Prater, we have no hesitation in holding that she, by that life and conduct, abandoned and forfeited all right she may ever have had to homestead in his property. She voluntarily and permanently deserted husband and home, eloped with another man, and lived with him, out of this state, in continuous lewd intercourse for a long period of years, even up to the very time her deserted husband died.

While he lived, there was no condonation of her offense, — no reconciliation between them. None was sought by her, none offered by him.

For her conduct, this record presents not the slightest excuse or justification.

It is true, she alleges improper relations on his part with another woman prior to the separation between him and complainant, but there is no effort to prove the truth of the allegation, nor is it admitted in the answer, so as to dispense with the necessity of proof.

In the absence of evidence, in some form, impeaching his treatment of complainant, it is presumed that he acted toward her as the law required him to do, and that her confessed desertion of him and his home was willful and without provocation.

His marriage to the defendant a few months before his death, and long years after the complainant abandoned him, does not reflect upon his conduct toward her before she left him; for the answer asserts that the marriage between him and the defendant was in regular form, and by them believed to be lawful, on the assumption that complainant had obtained a divorce from him.

True, this record furnishes no proof of a divorce, and the complainant must therefore, for the purposes of this suit, be regarded, in a technical sense, as the wife of the deceased at the time of his death.

But that cannot change the result. All except the mere formal relation of marriage had long since ceased to exist between them. She looked not to him for the protection and support due from a husband to his wife; nor did she perform for him, or acknowledge as due to him, any of those duties and obligations which a wife owes to her husband.

Though complainant is technically the widow of the deceased, she does not bear to him, to his family, or his estate, that relation which alone would justify her claim to homestead.

The homestead exemption is intended solely for the benefit of the family, and none are authorized in law to participate in its advantages, except those who come within the meaning of that term. Ordinarily, the wife is entitled to share in the homestead, because she is ordinarily a member of the family; but if she voluntarily withdraw from the family circle without cause, and of her free choice live elsewhere, she then and thereby excludes herself from the enjoyment of the homestead with the family.

So the "widow" to whom the right of homestead inures at the death of the husband must have been a member of his family in a legal sense when he died; otherwise she cannot successfully assert a claim to homestead in his estate after his death. This does not imply that she must in fact and in all instances have been residing with her husband upon the homestead at the time of his death; it is sufficient that she was at that time in law entitled to such residence with him, or with the family.

But if she has, willfully and without excuse, deserted the family, and eloped and lived with an adulterer, or otherwise so demeaned herself that she may neither in morals nor in law require the husband to receive her back again, she is, in such case, not a member of his family while he lives, and does not become his "widow" in contemplation of the homestead laws when he dies.

By all rules of public policy and good morals, the complainant in this case had forever excluded herself from the society, family circle, and home of her husband in his lifetime; and by the same rules she is excluded from the enjoyment of his homestead after his death.

Upon the whole case, it is true, as said in behalf of the complainant, that the right of homestead in this state is a constitutional right, and should be zealously guarded by the courts.

We have recognized this fact fully in the consideration of this case and in the preparation of this opinion.

But it is equally true that before a person can justly assert a constitutional right he must bring himself within the operation of the constitutional provision. This the complainant now before the court has failed to do in two particulars. She has not shown herself to be a resident of this state, nor has she shown herself to be the "widow" of the deceased in the sense contemplated by the constitution. She has failed to establish

for herself a *status* to which the constitutional provision in any sense applies.

Again, a constitutional right, like a statutory or other right, may be abandoned and forfeited by the beneficiary.

It has been so held repeatedly in this state and in many of the other states of the Union, and that, too, with respect to the right of homestead itself.

The decree as to homestead is reversed, and the bill dismissed.

Complainant will pay all costs.

HOMESTEAD — NON-RESIDENTS. — There is nothing in the Michigan homestead act which contemplates that a wife who has never lived on the premises or claimed to live there may, after her husband's death, claim such an interest by relation as will avoid his dealings with property which he never meant should be the home of the absentee, however much he may have wronged her; for the provisions of the homestead act are confined expressly to resident widows: *Stanton v. Hitchcock*, 64 Mich. 316; 8 Am. St. Rep. 821, and note 825. Compare *Lee v. Moseley*, 101 N. C. 311. But in *Christie's Succession*, 20 La. Ann. 383, 96 Am. Dec. 411, it was held that the wife of a husband who dies domiciled and leaving property in Louisiana is entitled to the benefit of the homestead law, although she never resided in the state; and a wife permanently separated from her husband by agreement, after his neglect to support her, may herself acquire a homestead: *Kenley v. Hudelson*, 99 Ill. 493; 39 Am. Rep. 31. Abandonment by a wife of her husband may destroy her right to a homestead in his property: Note to *Christie's Succession*, 96 Am. Dec. 412-415.

HUSBAND AND WIFE — DOMICILE OF WIFE. — The domicile of the husband is the legal domicile of the wife: *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125; although the wife may be actually residing at another place: *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530. The domicile of a husband draws to it the domicile of the wife: Note to *Christie's Succession*, 96 Am. Dec. 414. The domicile of the husband determines that of the wife, and the mere removal of the wife from the state where the husband is domiciled does not operate to change her domicile, even though she is induced to leave it by her husband's harsh treatment: *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227; *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549; yet the domicile of a husband and his wife may in some cases be different: Note to *Harteau v. Harteau*, 25 Am. Dec. 378.

WESTERN UNION TELEGRAPH CO. v. MUNFORD.

[87 TENNESSEE, 190.]

TELEGRAPHS—TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS; nor are they insurers, either of the accurate transmission or the sure and prompt delivery of messages. They are liable, however, for losses consequent upon their negligence.

TELEGRAPHS—TELEGRAPH COMPANY RECEIVING MESSAGE FOR TRANSMISSION OVER ITS OWN LINE, AND WHICH BECOMES the agent of the sender to forward it over the line of another company, may, by special contract with the sender, limit its liability to defaults occurring upon its own line, and protect itself against any loss occasioned by the negligence of the connecting company.

TELEGRAPHS—ALTHOUGH ADDRESS OF MESSAGE IS CHANGED THROUGH NEGLIGENCE OF TELEGRAPH COMPANY in transmitting it to a connecting line, yet if it appears that the loss occasioned by delay in the delivery of the message was not in consequence of such error, but was the result solely of the subsequent and independent negligence of the connecting company, the former is not liable for the damage sustained. The change of address in such case cannot be regarded as the proximate cause of loss.

J. W. Bonner, for the plaintiff in error.

Murray and Spurlock, for the defendant in error.

LURTON, J. This is an action brought by E. W. Munford, the testator of defendant in error, in his lifetime, to recover damages alleged to have been sustained by delay in the transmission of a telegram. E. W. Munford, on the 11th of April, 1887, delivered to the agent of the plaintiff in error, at its office in McMinnville, Tennessee, a telegram for transmission to Tampa, Florida, of which the following is a copy:—

“McMINNVILLE, TENN., April 11, 1887.

“COL. SAM. TATE, Tampa, Florida.

“Proposition accepted. Your draft for one thousand will be honored.

(Signed)

“E. W. MUNFORD.”

The line owned and operated by the Western Union Telegraph Company did not extend to Tampa, Florida, but terminated at Jacksonville, in that state. From Jacksonville to Tampa there was a telegraph line owned and operated by the South Florida Telegraph Company, and the message in question could only be transmitted to its destination by being sent over the line of the Western Union Telegraph Company to Jacksonville, and then transferred to the South Florida Company, by whom it would be sent to Tampa. Of this fact Mr. Munford was advised by the agent who received his mes-

sage for transmission. The telegram was promptly forwarded, reaching Tampa early in the afternoon of the same day.

In transmission the address of the message was changed from "Col. Sam. Tate," to "Col. Wm. Tate." This, it is agreed, occurred on the line of the plaintiff in error before it was transferred to the connecting company. The message was not delivered by the South Florida Company to Colonel Tate until the 13th, it having been received at Tampa on the 11th. Plaintiff below alleged that by this delay he sustained damages amounting to five hundred dollars.

In the view we take of the case, it is only necessary to consider one of the defenses presented by the pleas of the plaintiff in error, and that, in substance, is, that the delay in the delivery of the message was not occasioned by the error in transmitting the address, but resulted alone from the negligence of the agent of the South Florida Company.

The facts concerning this delay, as we find them to be from the transcript, are these: The agent of the South Florida Company at Tampa personally knew Colonel Samuel Tate. He states that he knew of no such person as Colonel William Tate, and that when he received this message he believed it to be intended for Colonel Samuel Tate; that he instructed the messenger, whose duty it was to make personal delivery of messages, to inquire and learn if there was a Colonel William Tate in Tampa, and if he could hear of no such person to take the message to Colonel Samuel Tate. The messenger thus instructed says he made inquiry, and hearing of no William Tate, undertook to deliver the message to Colonel Samuel Tate; that he took it to the office of S. A. Jones, where both he and the agent say they had been requested by Mr. Jones to leave messages for Colonel Tate. The messenger states, upon inquiry for Colonel Tate, a clerk in the office informed him that Colonel Tate was then at Clear Water Harbor. This information being communicated to the agent of the telegraph company, he on the same day, instead of making further inquiry for Colonel Tate, mailed the message addressed to Colonel Samuel Tate at Clear Water Harbor, Florida. The fact, as shown by the proof, is, that Colonel Tate was in Tampa on the 11th, and had been there for some days, and that he had never authorized delivery of messages for him at the office of Mr. Jones, but that, on the contrary, he was accustomed to receive his messages at his usual boarding-place, which was known at least to some of the telegraph company's messen-

gers. Two days thereafter Colonel Tate called at the telegraph company's office to inquire about another message, when he was handed a copy of the telegram which had been mailed to him at Clear Water Harbor.

If the message had been delivered to him on the day it was received and mailed to Clear Water Harbor, it is conceded that the damage alleged to have been sustained would not have occurred.

The facts, as above recited, are not disputed, and establish beyond controversy that the delay in the delivery of the message was not in consequence of the error in transmission of the address, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company. The damage alleged to have been sustained was the direct consequence of delay in delivery; for Colonel Tate says that he should have had no doubt, upon seeing the message, that it was for him alone, and that he should have acted upon it. The damages to be recovered, whether the *gravamen* of the action be regarded as breach of contract or a technical tort, must be limited to such as are the natural and proximate result of the injury or wrong done.

This brings us to the consideration of the question as to whether the plaintiff in error is responsible for damages which resulted alone from the negligent delay in the delivery of this message by the agent of the South Florida Telegraph Company. The message was written upon one of the usual blanks furnished by the Western Union company. One of the printed conditions contained on this blank reads as follows: "This company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." Is this a valid limitation upon the liability of the company?

Telegraph companies are not common carriers; nor are they insurers, either of the accurate transmission or the sure and prompt delivery of messages. They are liable, however, for losses consequent upon their negligence: *Marr v. Western Union Tel. Co.*, 1 Pickle, 536.

Even common carriers are not responsible for losses occurring upon a connecting line unless there was a contract upon their part to be so responsible. That they may by contract limit their liability to defaults occurring upon their own lines is well settled. So the fact that two lines are connected, and for their mutual convenience collect freight for each other upon

goods delivered for transmission over both lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to be: *Brumley v. Railroad*, 5 Lea, 401.

These principles, applicable to common carriers, seem to us to be alike applicable to telegraph companies. Mr. Gray, in his very valuable monograph upon communication by telegraph, in discussing this limitation found in the contract of the Western Union company, and quoted above, says: "Two entirely distinct provisions are embodied in this regulation. One provision is, that the telegraph company, in consideration of receiving full prepayment for the delivery of a message at a place upon the line of another company, agrees to deliver the message to a connecting company, and as the agent of the sender, to contract with that company for the further transmission of the message. This is an offer of special terms of contract. A telegraph company is, it seems, under an obligation by its ordinary contract only upon receipt of its own charges to deliver the message to a connecting company. It is under no obligation by that contract to contract, as the agent of its employer, with the connecting company for the further transmission of the message, or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. . . . The other provision embodied in this regulation is, that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms. As such it constitutes with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of a partnership relation between them, one telegraph company has no more authority over another telegraph company than an individual has. A telegraph company should be entitled, therefore, to contract specially with one who wishes to employ it that it shall not be liable for loss occasioned by the act of a connecting company; that that person shall seek relief, in case of a loss directly of the company which causes and is under any circumstances finally liable for the loss": Gray on Telegraphic Communication, sec. 33.

That the Western Union and South Florida telegraph companies were entirely distinct and independent corporations, and that no partnership relations existed between them, is ad-

mitted in the agreed statement of facts contained in the record. The case was tried by the circuit judge without the intervention of a jury, who, being of opinion that the error in transmission of address was the proximate cause of the damage sustained, gave judgment in favor of the plaintiff below.

This judgment is not supported by any material facts, and must be reversed, and judgment rendered here in favor of the Western Union Telegraph Company.

TELEGRAPHS. — A telegraph company cannot contract to relieve itself from liability for negligence in failing to deliver messages: *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353, and cases cited in note 358; but this doctrine is limited in *Pegram v. Western Union Tel. Co.*, 97 N. C. 57, where it was held that a telegraph company might exempt itself from liability for ordinary negligence in sending unrepeatd messages, but even in such cases could not stipulate against gross negligence. Telegraph companies may not limit their liability so as to relieve themselves against gross negligence by making a provision in their contracts with senders of messages that they will not be liable for an unrepeatd message beyond the amount of charges for sending; but this rule does not make the companies insurers: *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note. While a telegraph company may restrict its liability, it cannot contract against the consequences of its own negligence, nor limit a recovery for damages thereby sustained: *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672, and note 675. Negligence in a telegraph company, without regard to the degree of such negligence, will render such company liable for actual damage resulting from its failure to deliver a telegraphic message; and the failure of one who pays a company to transmit a message to have such message repeated will not exempt the company from damages through its negligence in not having the message delivered; and this is true even though the printed matter on the back of the blank furnished by the company, and on which the message was written, contains a stipulation that the company will only be liable for the amount received for sending the dispatch, if any delay should occur in its delivery, unless the message be repeated: *Gulf, C., & S. F. R'y Co. v. Wilson*, 69 Tex. 739.

TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS in the strict sense of the term, although engaged in a public employment, and are bound to transmit for all persons messages presented to them for that purpose; and therefore such companies are not insurers, like common carriers, though they must use ordinary care in the transmission of messages, and are liable for a want of skill, for negligence, or for unfaithfulness in the performance of the duties incident to their business: *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211. Whether or not telegraph companies are common carriers has been variously decided, some courts holding that they are: *Parks v. Alta Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589, and cases cited therein; while other courts held the contrary doctrine: *Birney v. Printing Tel. Co.*, 18 Md. 341; 81 Am. Dec. 610; note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 463; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446.

GROSS v. DAVIS.

[57 TENNESSEE, 225.]

SURETYSHIP — CONTRIBUTION — FOUNDATION OF DOCTRINE OF CONTRIBUTION AMONG SURETIES is the fact that one has paid more and another less than his share; and a surety who has paid less than his ratable share cannot enforce contribution, even against his co-sureties who have paid nothing.

SURETYSHIP. — IN SUIT IN EQUITY BY SURETY TO ENFORCE CONTRIBUTION AGAINST HIS CO-SURETIES, the rate of contribution is determined according to the number of solvent sureties, and not by the whole number of sureties, as in an action at law.

SURETYSHIP. — IN MAKING CONTRIBUTION AMONG SURETIES, ALL PAYMENTS made on the joint indebtedness must be added together, and the aggregate divided by the number of solvent sureties, charging each with his share thus ascertained, and crediting him with the amount of his payments.

SURETYSHIP. — SURETY WHO HAS PAID MORE THAN HIS PART, AND WHO SUES FOR CONTRIBUTION, IS ENTITLED to a recovery of the excess against each of his co-sureties equally, when there is no contravening equity, provided it subjects none of them to the payment of more than his proper share of the whole joint liability; but a defendant surety in the suit who has paid more than his part can have no recovery in his favor against his co-sureties for the excess, upon answer merely, without cross-bill.

SURETYSHIP. — ATTORNEYS' FEES AND COSTS AS MATTER FOR CONTRIBUTION. — Attorneys' fees paid by a surety, which were incurred with the consent of his co-sureties in making a prudent defense for their common benefit are proper matter for contribution, and so are costs adjudged against the sureties jointly in such litigation, and paid by one of them.

Marks and Gregory, and John Simmons, for the appellants.

Estell and Whitaker, for the respondent.

CALDWELL, J. This is a bill for contribution among sureties. In April, 1860, John G. Enochs was qualified as clerk of the county court of Franklin County, with Gross, Henderson, Colyar, Slatter, and others as sureties on his official bond.

After the close of the war, several suits were instituted against him and his sureties. One of those suits finally resulted in a decree in this court against the defendants for about eight hundred dollars, besides costs. The others were successfully defended.

Gross paid the greater part of the decree mentioned, including \$130 court costs. The other part of that decree was paid by Davis, as personal representative of Slatter, who had died.

Enochs, the principal, and all the sureties except those above named, were insolvent when the present proceedings were commenced, and for that reason were not made parties.

In his answer, Davis set up the fact of the payment made by him on the decree, and insisted that the estate of his intestate was thereby discharged from further liability.

Henderson claimed in his answer that he had paid for himself and co-sureties more than one thousand dollars in fees to lawyers for defending the several suits brought against them and Enochs.

Calyar made no defense, and decree *pro confesso* was taken against him.

The chancellor adjudged that Gross was entitled to recover from Davis, Henderson, and Colyar, each, one fourth of the sum he had paid, with interest, making the recovery against each of the three \$210.06. He then adjudged that Davis was entitled to a credit on the recovery against him by the amount of one fourth of the sum which Davis had paid, with interest. That credit being \$48.04, the net balance of the recovery against Davis was \$162.02. Nothing was allowed Henderson on account of attorneys' fees claimed to have been paid by him. Both Davis and Henderson have appealed.

□ The decree is erroneous. It proceeds upon the idea that every surety who has paid a part of the joint liability may recover from each of his co-sureties his proportionate part of the sum so paid.

As applied to a case where the whole liability has been discharged by one of several sureties, the rule adopted by the chancellor is correct; but it is not applicable when more than one of the sureties have made payments on the joint indebtedness. In the latter case, all payment must be added together, and the aggregate divided equally among the sureties.

To illustrate: If the \$840.24 paid by Gross had discharged the whole liability, and none of the other sureties had paid anything, he would be entitled to a decree against each of the other three solvent sureties for one fourth of that amount, namely, \$210.06. But as the chancellor adjudged that Gross paid \$840.24 and Davis \$192.16, and that the other sureties had paid nothing, he should, in that case, have added those two sums together, and divided the aggregate of \$1,032.40 into four equal parts, of \$258.10 each, and allowed contribution accordingly.

The decree thus indicated, upon the *data* used by the chancellor, would have given Davis credit for the full amount paid by him, and settled the equities of all the sureties, instead of allowing him credit for only \$48.04, and leaving him with a)

claim for the same amount against both Henderson and Colyar, as does the decree actually pronounced.

It is well settled that one surety may have contribution from his co-sureties only when and to the extent that he may have paid more than his ratable proportion of the joint liability: Brandt on Suretyship and Guaranty, sec. 251.

The very foundation of the doctrine is the fact that one has paid more and another less than his share. Hence Davis could not maintain a suit for contribution at all under the facts of this case. He could not recover from Henderson and Colyar the one fourth of the amount he has paid. Yet the decree leaves him with his claim therefor against each of them.

The decree of the chancellor is erroneous, not only in the result reached upon the assumption that only Gross and Davis had made payments on the joint liabilities, but it is also erroneous in that assumption itself; for it is distinctly proven that Henderson paid \$1,087.60, for which all the sureties were legally bound to contribute. This sum includes principal and interest up to the time he gave his deposition, which, though in fact a little earlier, we treat as of the date of the decree below. This particular date for the addition of interest is adopted for convenience, because the sums already stated as having been paid by Gross and Davis, respectively, include interest up to the same date.

Then we find the fact to be that Gross paid \$840.24, Davis \$192.16, and Henderson \$1,087.60, making a total of \$2,120, one fourth of which is \$530. The \$530 represent the share of each of the four solvent sureties. This being a suit in equity, the rate of contribution is determined according to the number of solvent sureties, and not by the number of sureties on the bond, as in an action at law: *Riley v. Rhea*, 5 Lea, 116; Brandt on Suretyship and Guaranty, sec. 252. In chancery, the insolvent principal and insolvent sureties are not even necessary parties: Brandt on Suretyship and Guaranty, sec. 256.

Henderson has paid more than his part; hence no recovery can be had against him, and notwithstanding his excessive payment, he can have no recovery in his favor in this proceeding for the excess, because he set up his payment as a matter of defense only, and did not seek any affirmative relief against any one. Gross, however, having filed his bill for that purpose, is entitled to contribution from Davis, who has paid less

than his share, and from Colyar, who has paid nothing. The amount paid by Gross in excess of his share is \$310.24. That, with interest from date of decree below, he is entitled to recover from Davis and Colyar, — one half from each. We say one half from each, because the bill treats these two defendants as equally liable to the complainant, and seeks the same decree against each of them. Such expression in pleading on the part of the complainant will be regarded, when there is no contravening equity.

The fact that Davis has already paid something, and that Colyar has paid nothing, affords no reason why Gross should not have an equal recovery against each of them; for one half the excess paid by Gross and the full sum paid by Davis together do not aggregate as much as \$530, the share of one surety in the whole liability discharged.

It has been argued in behalf of Gross that the doctrine of contribution does not extend to attorney's fees, and that, for that reason, the payment of \$1,087.60 by Henderson was properly disregarded by the chancellor.

In this view we cannot concur. Suits were commenced against Enochs and his sureties. The services of counsel were needed by the sureties, who made a common defense. Counsel were employed in the name of all the sureties, and rendered services for their mutual benefit. Gross knew this. He accepted the services, took an interest in the progress of the litigation, and distinctly agreed with his co-sureties from time to time that he would pay his share of the fees. These were the fees paid by Henderson.

The employment of counsel was not only prudent, but it was necessary, and probably resulted in saving the sureties large sums of money. A surety who pays fees under such circumstances is entitled to contribution the same as another surety who pays a judgment or decree recovered against them. By the authorities, it is sufficient that the fees were incurred in making a prudent defense: *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 102; Brandt on Suretyship and Guaranty, sec. 247; 4 A. & E. Enc. of Law, 3, note 1.

As against Gross, it is insisted that the chancellor erred in allowing him contribution for the \$130 of court costs which he paid. The decree in this respect was right. It has been well said by the supreme court of Maine that "the costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one,

applies equally to the other": *Davis v. Emerson*, 17 Me. 64; Brandt on Suretyship and Guaranty, sec. 247.

Contribution was decreed as to traveling expenses in *Preston v. Campbell*, 3 Hayw. (Tenn.) 20.

Let the decree below be reversed, and decree be entered here in accordance with this opinion. One fourth of all costs in this cause will be paid by each of the four parties.

RIGHT OF ONE SURETY TO ENFORCE CONTRIBUTION FROM ANOTHER, AND THE REMEDIES FOR ITS ENFORCEMENT. — *Right of Surety to Contribution in General.* — The right of one surety to contribution from another is based upon the maxim, "Equality is equity," and originally the right was enforced only in equity, and upon principles of natural justice. The right to it did not depend upon contract, but sprung from equitable considerations arising out of the relations of the parties to each other, and the fact of a common interest and a common burden to bear: *Van Winkle v. Johnson*, 11 Or. 469; 50 Am. Rep. 495; *Tyus v. De Jarnette*, 26 Ala. 280; *Bragg v. Patterson*, 85 Ala. 233; *Lansdale v. Cox*, 7 T. B. Mon. 401; *Russell v. Failor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Camp v. Bostwick*, 20 Ohio St. 347; 5 Am. Rep. 669; *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747; *Neilson v. Fry*, 16 Ohio St. 552; *Paulin v. Kaighn*, 29 N. J. L. 480; *Norton v. Coons*, 6 N. Y. 33. But the doctrine of contribution, as applied and administered in equity, has been so long and so generally recognized that courts of law in modern times have assumed jurisdiction: See *Lansdale v. Cox*, 7 T. B. Mon. 401; and it is said that it may be regarded as now settled, that the right of action in such cases arises out of a contract implied in law to contribute among the sureties a ratable proportion of the amount for which all are liable: *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351; and see *Agnew v. Bell*, 4 Watts, 31. Originating in equity, it has been grafted upon the law with the aid of an implied promise to secure the legal remedy: *Johnson v. Harvey*, 84 N. Y. 363; 38 Am. Rep. 515; *Oldham v. Broom*, 28 Ohio St. 41, 48. But it is not every case of suretyship in which there is a right to contribution, and the right exists only where the relation of the parties is that of co-sureties. If the parties can be regarded as co-sureties the right to contribution exists, otherwise it does not: *Salysers v. Ross*, 15 Ind. 130; *Houck v. Graham*, 106 Id. 195; 55 Am. Rep. 727; as a general principle, the right exists only among those who are sureties for the same thing, and bound for the same debt or duty: *Monson v. Drakely*, 40 Conn. 552; 16 Am. Rep. 74; the undertaking must be joint, not separate and successive: *McDonald v. Magruder*, 3 Pet. 470. It is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt for which they were bound: *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Aldrich v. Aldrich*, 56 Vt. 324; 48 Am. Rep. 792. And the liability exists although the sureties are ignorant of each other's engagement: *Wells v. Miller*, 66 N. Y. 258. The rule is, that if several persons, or sets of persons, enter into contracts of suretyship which are the same in their legal operation and character, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution: *Monson v. Drakely*, 40 Conn. 552; 16 Am. Rep. 74; *Woodworth v. Bowes*, 5 Ind. 276; and see *Houck v. Graham*, 106 Id. 195; 55 Am. Rep. 727; *Young v. Shunk*, 30 Minn. 503; *Harris v. Fer-*

guson, 2 Bail. 397; *Craig v. Aukeny*, 1 Gill, 225; *Chaffee v. Jones*, 19 Pick. 260; *Norton v. Coons*, 6 N. Y. 33; *Armitage v. Pulver*, 37 Id. 494. And presumptively, if two persons put their names on paper for the accommodation of a third, they are co-sureties, and the right to contribution exists: *Richards v. Simms*, 1 Dev. & B. 48; *Baldwin v. Fleming*, 90 Ind. 177; *Oldham v. Broom*, 28 Ohio St. 41. So the legal right of sureties to contribution as against each other is not governed by the *lex loci contractus*, and there is no implied obligation that they shall reside or remain in any particular locality: *Aldrich v. Aldrich*, 56 Vt. 324; 48 Am. Rep. 791. But it is well settled that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution: *Paul v. Berry*, 78 Ill. 158; *Keith v. Goodwin*, 31 Vt. 268; 73 Am. Dec. 345.

When Right to Contribution from Co-surety Accrues. — As a general rule, where it is established that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved: *Batchelder v. Fiske*, 17 Mass. 468; *Paul v. Berry*, 78 Ill. 158. The right accrues at the time of payment: *Stallworth v. Preslar*, 34 Ala. 505; *Nally v. Long*, 56 Md. 567; and a surety may, without compulsion, pay the debt when due, and immediately sue his co-surety for contribution without demand or notice: *Wood v. Perry*, 9 Iowa, 479; *Judah v. Micure*, 5 Blackf. 171; *Mason v. Pierron*, 69 Wis. 585; *Hichborn v. Fletcher*, 66 Me. 209; 22 Am. Rep. 562; *Parham v. Green*, 64 N. C. 436; and without showing that he paid at the request of his co-surety: *Hoyt v. Tutthill*, 33 Hun, 196. If a judgment has been rendered against him, he may pay and demand contribution without waiting for execution to be taken out: *Briggs v. Hinton*, 14 Lea, 233; and if he is obliged to pay the whole of a judgment against the sureties, he can maintain a bill for contribution without first obtaining a judgment at law against his co-surety: *Ry-nearson v. Turner*, 52 Mich. 7; *Neilson v. Williams*, 42 N. J. Eq. 291. It is, however, held that contribution cannot be enforced on the ground merely that a liability exists, or even that a judgment has been recovered, but that there must have been either a payment of the demand, or such an assumption of it as imposes upon the claimant more than his share, and correspondingly releases the others: *Backus v. Coyne*, 45 Mich. 584; and see *Skrainka v. Rohan*, 18 Mo. App. 340. A surety who has paid less than his share or proportion of the common debt or liability is not entitled to recover contribution from his co-surety: *Taylor v. Means*, 73 Ala. 468; *Smith v. State*, 46 Md. 617; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; unless by the payment of less than his share the common debt is entirely satisfied, in which case he would be entitled to contribution: *Stallworth v. Preslar*, 34 Ala. 505. Anything which the creditor accepts as satisfaction, as, for instance, the note of the surety, will be a payment: *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604; *Pinkston v. Taliaferro*, 9 Ala. 547; *White v. Carlton*, 52 Ind. 371; *Robertson v. Maxcey*, 6 Dana, 101; *Anthony v. Purcifull*, 8 Ark. 494; and the surety will be entitled to contribution even though the note chances not to be paid: *Stubbins v. Mitchell*, 82 Ky. 535; *contra*, *Nowland v. Martin*, 1 Ired. 307. And a surety who pays a note to which there existed a good defense, he being ignorant of the fact, and having acted in good faith and without negligence, may compel contribution from his co-sureties: *Hichborn v. Fletcher*, 66 Me. 209; 22 Am. Rep. 562; *Houck v. Graham*, 106 Ind. 195; 55 Am. Rep. 727. The rule is, that if in ignorance of the facts and in good faith the surety makes payment, when if all the facts were known he would not be liable, he can compel contribution, if he is guilty of no neglect in such want of knowl-

edge: *Hichborn v. Fletcher*, 66 Me. 209; 22 Am. Rep. 562; *Warner v. Morrison*, 3 Allen, 566. But if with a full knowledge of the facts, and under a mistaken belief of liability, he makes payment when he is under no legal obligation, it is to be regarded as a voluntary payment, for which he cannot claim contribution: *Bancroft v. Abbott*, 3 Allen, 524; *Russell v. Faylor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Skillin v. Merrill*, 16 Mass. 40; *Aldrich v. Aldrich*, 56 Vt. 324; 48 Am. Rep. 791.

In Louisiana, the three necessary conditions to the exercise of the right of a surety to enforce contribution are, that the surety demanding contribution, and the one from whom it is demanded, must each have been surety for the same debtor and for the same debt, and the surety who is demanding contribution must have paid in consequence of a lawsuit: *Stockmeyer v. Oertling*, 35 La. Ann. 467.

INSOLVENCY OF PRINCIPAL. — As a general proposition, the right of a surety to recover contribution from a co-surety, the principal being insolvent, is clear: *Cage v. Foster*, 5 Yerg. 261; 26 Am. Dec. 265; *Hichborn v. Fletcher*, 66 Me. 210; 22 Am. Rep. 562; *Strother v. Mitchell*, 80 Va. 149. Nor is it necessary, according to the weight of authority, to show the insolvency of the principal, or that payment from him cannot be obtained, in order to compel contribution: *Roberts v. Adams*, 6 Port. 361; 31 Am. Dec. 694; *Buckner v. Stewart*, 34 Ala. 529; *Sloo v. Pool*, 15 Ill. 47; *Rankin v. Collins*, 50 Ind. 158; *Boyer v. Marshall*, 44 Hun, 623. The general rule is, that the right of action for contribution accrues when one surety has paid more than his proportion of the joint liability: *Aldrich v. Aldrich*, 56 Vt. 324; 48 Am. Rep. 791; *Peaslee v. Breed*, 10 N. H. 489; 34 Am. Dec. 178. Nevertheless, there is authority for the proposition that a surety cannot maintain a suit in equity for contribution against his co-surety without making it appear that the principal is insolvent, or that payment cannot be obtained of him: See *Allen v. Wood*, 3 Ired. Eq. 386; *Rainey v. Yarborough*, 2 Id. 249; 38 Am. Dec. 681; *Bolling v. Doneghy*, 1 Duvall, 220; *Daniel v. Ballard*, 2 Dana, 296; *McCormack v. O'Bannon*, 3 Munf. 484; 5 Am. Dec. 509; *Stone v. Buckner*, 20 Miss. 73; and that, in an action at law for contribution, the insolvency of the principal must be alleged and proved: *Morrison v. Poyntz*, 7 Dana, 307; 32 Am. Dec. 92; *contra*, *Rankin v. Collins*, 50 Ind. 158; see *Mason v. Pierron*, 63 Wis. 239.

Payment of Debt Barred by the Statute of Limitations. — It has been held that a surety who pays the debt after it is barred by the statute of limitations cannot compel contribution against his co-surety, who is equally protected by the bar of the statute: *Cocke v. Hoffman*, 5 Lea, 105; 40 Am. Rep. 23; *Shelton v. Farmer*, 9 Bush, 314; *Cochran v. Walker*, 82 Ky. 220; 56 Am. Rep. 891; since the party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by the party demanding contribution: *Stockmeyer v. Oertling*, 35 La. Ann. 467; and a payment by one surety after the bar of the statute has attached does not revive the debt against the co-sureties: *Long v. Miller*, 93 N. C. 227; *Green v. Greensboro Female College*, 83 Id. 449. On the other hand, where the estate of a deceased surety was discharged from liability to the creditor, through the latter's negligence by operation of the statute of limitations, and a co-surety afterward paid the debt, it was held that the estate was liable to contribute to such a co-surety, notwithstanding it was released from direct liability to the creditor: *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; and see *Evans v. Evans*, 16 Ala. 465. So it was held that a surety on a guardian's bond was not obliged to plead the statute of limita-

tions in an action against him by the ward, and that his failure to do so would not defeat his right to recover contribution against his co-surety: *Jones v. Blanton*, 6 Ired. Eq. 115; 51 Am. Dec. 415. So where co-sureties on a note lived in Vermont, and after the statute of limitations had run against the note, one of the sureties in good faith went to New Hampshire, where the statute was no defense, and judgment was recovered against him on the note, and he was compelled to pay, it was held that his co-surety must contribute: *Aldrich v. Aldrich*, 56 Vt. 324; 48 Am. Rep. 791. And it is held that payment by a surety after the statute of limitations would have run but for the fact of a judgment in a suit previously commenced may be availed of against a co-surety: *Glasscock v. Hamilton*, 62 Tex. 143.

RIGHT TO CONTRIBUTION AS AFFECTED BY INDEMNITY TO SURETY. — The relation of co-sureties being one of mutual trust and confidence, they are entitled to participate equally in any indemnity which either of them may obtain from the principal, directly or indirectly. A fund received by one of the sureties by way of indemnity inures to the benefit of all: *Agnew v. Bell*, 4 Watts, 31; *Shaeffer v. Clendenin*, 100 Pa. St. 565; *Wolcott v. Hagerman*, 50 N. J. L. 289; *Miller v. Sawyer*, 30 Vt. 412; *McCune v. Belt*, 45 Mo. 174; *Seibert v. Thompson*, 8 Kan. 65; *Titcomb v. McAllister*, 81 Me. 399; *Hall v. Robinson*, 8 Ired. 56; *Steele v. Mealing*, 24 Ala. 285. And a surety who is compelled to pay the debt of his principal is entitled to his share of any security held by his co-sureties: *Whiteman v. Harriman*, 85 Ind. 49; and see *Hall v. Cushman*, 16 N. H. 462; 43 Am. Dec. 562, and note discussing the subject 563. And where it appears that the paying surety has been indemnified to the full extent of payments made by him, he is not entitled to recover contribution from his co-sureties, but must indemnify himself out of the means placed in his hands: *Reinhart v. Johnson*, 62 Iowa, 155; *Morrison v. Taylor*, 21 Ala. 779; *Ramsey v. Lewis*, 30 Barb. 403; *Goodloe v. Clay*, 6 B. Mon. 236. And if a surety misapplies funds received by him, and which he should have applied to the payment of the debt for which he was bound, he cannot, when afterwards compelled as surety to pay the debt, compel contribution from a co-surety: *Simmons v. Camp*, 71 Ga. 54. A surety who receives from his principal a mortgage or other security is regarded as a trustee for his co-surety, and is held to the exercise of the duties which attach to that relation; and if he afterwards, without the consent of his co-surety, surrenders or abandons the security, he cannot compel contribution from his co-surety: *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747; and so if he permits the mortgagor to squander the property: *Teeter v. Pierce*, 11 B. Mon. 399. And where one of two sureties receives property by deed of trust to indemnify him, and the trustee sells the property by direction of the surety, but fails to collect the money, such secured surety paying the debt cannot obtain contribution from his co-surety: *Chilton v. Chipman*, 13 Mo. 470. But a surety who receives securities as an indemnity to all is not liable, if he manages them with prudence and in good faith. And if he exchanges them for others, although without the knowledge of his co-sureties, but in good faith, he does not thereby discharge the latter from contribution: *Carpenter v. Kelly*, 9 Ohio, 106.

Contribution, where Surety Becomes Such at Request of Co-surety. — The weight of authority is to the effect that if one becomes surety at the request of a co-surety, he is not liable to the latter for contribution. The rule is thus stated: "If two persons sign the same obligation as sureties for a third, one of them at the request of the principal and the other at the request of first surety, they are not co-sureties as between themselves, but the first

surety stands in the relation of principal to the second, and is responsible to him for whatever he may be compelled to pay, and has, in no event, any claim against him for contribution": Bell, J., in *Cutter v. Emery*, 37 N. H. 567, 575; and see, in support of the rule, *Taylor v. Savage*, 12 Mass. 102; *Byers v. McClanahan*, 6 Gill & J. 250; *Blake v. Cole*, 22 Pick. 101; *Beaman v. Blanchard*, 4 Wend. 432; *Pickering v. Marsh*, 7 N. H. 192; *Baxter v. Moore*, 5 Leigh, 219; *Daniel v. Ballard*, 2 Dana, 296. Such is undoubtedly the rule when one of two sureties becomes such at the request of his co-surety, and upon his promise that he would be put to no loss, or that he would save him harmless; and such promise may be shown by parol: *Appar v. Hiler*, 24 N. J. L. 812; and see *Solomon v. Reese*, 34 Cal. 28. And where a surety becomes liable by signing at the request of a co-surety, who agrees to indemnify and save him harmless, he may, after the debt becomes due, maintain a bill in equity to compel the co-surety to pay the debt, and save him harmless, not only as to money paid, but also as to whatever he is liable to pay on account of being such surety: *Hayden v. Thrasher*, 18 Fla. 795. But some of the authorities hold that the fact that one becomes surety merely at the request of another surety raises no obligation against the latter to save the former harmless, and does not relieve him from liability to respond to the surety making the request, in case he pays more than his proportion of the principal's debt: *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351; *Burnett v. Millsaps*, 59 Miss. 333. The mere request by one to the other to sign as surety is held to be insufficient to overcome the *prima facie* liability to contribution between co-sureties: *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351; *McKee v. Campbell*, 27 Mich. 497; and it is said that in all the cases holding otherwise there was something more than a mere request by one to the other to become surety, either a promise, written or verbal, to indemnify, or a taking of security from the principal, in either of which cases the courts hold such surety released from contribution: *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351, 354. But one who becomes surety at the request of the principal, though the request of another surety be coupled with it, is not released from liability for contribution to the latter surety: *Hendrick v. Whittemore*, 105 Mass. 23.

The surety of a surety is not, in general, entitled to claim contribution: *Price v. Edwards*, 11 Mo. 526; *Know v. Vallandigham*, 21 Miss. 526; *Hartwell v. Smith*, 15 Ohio St. 200; *Oldham v. Broom*, 28 Id. 41; *Sherman v. Black*, 49 Vt. 198. Thus if a party signs a note as security for one who is himself only a surety for the principal maker, he is not liable in a suit for contribution by the one for whom he signed as security: *Robertson v. Deatherage*, 82 Ill. 511; and to the same effect, see *Sayles v. Sims*, 73 N. Y. 551; *Chapeze v. Young*, Ky. Ct. App., 1888.

Discharge of Surety in Bankruptcy. — The rule is asserted in many of the decisions that a surety who has paid the debt may have contribution from a co-surety, although the latter had, prior to the payment by the surety, been discharged in bankruptcy from liability on the contract: *Keer v. Clark*, 11 Humph. 77; *Goss v. Gibson*, 8 Id. 197; *Swain v. Barber*, 29 Vt. 292; *Dole v. Warren*, 32 Me. 94; 52 Am. Dec. 640; *Dunn v. Sparks*, 1 Ind. 397; 50 Am. Dec. 473; *Liddell v. Wiswell*, 59 Vt. 365; *Clements v. Langley*, 2 Nev. & M. 269; 5 Barn. & Adol. 372. But the contrary has been held, upon the ground that if the right to contribution results from a general principle of equity, that sureties *in equali jure* must bear the common burden equally, and that it will be enforced whenever they are bound for a principal debtor in relation to one and the same transaction, then it follows that all claim to it

ceases when that obligation is canceled, either by the act of the parties or by operation of law: *Tobias v. Rogers*, 13 N. Y. 59, 66; and see *Cocke v. Hoffman*, 5 Lea, 105; 40 Am. Rep. 23, 24; *Hays v. Ford*, 55 Ind. 52; *Miller v. Gillespie*, 59 Mo. 220.

Contribution from Estate of Deceased Co-surety. — The death of one of two or more co-sureties does not relieve his estate from a liability to contribute: *Bachelder v. Fiske*, 17 Mass. 464; *Aikin v. Peay*, 5 Strob. 15; 53 Am. Dec. 684; *McKenna v. George*, 2 Rich. Eq. 15; *Stothoff v. Dunham*, 29 N. J. L. 181; *Stephens v. Meek*, 6 Lea, 226; and see *Williams v. Ewing*, 31 Ark. 229; *Stevens v. Tucker*, 87 Ind. 109. The law implies a contract between the sureties originating at the time they executed the obligation by which they became such, to contribute ratably toward discharging any liability which they incur in behalf of their principal; and in case of the death of either, the obligation devolves upon his legal representatives the same as any other contract made by him, the breach of which occurs after his death: *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey*, 84 N. Y. 363; 38 Am. Rep. 515; *Conover v. Hill*, 76 Ill. 342; and see *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; but see *contra*, *Waters v. Riley*, 2 Har. & G. 305; 18 Am. Dec. 302.

Costs and Expenses as Matter for Contribution. — As a general rule, the right of contribution does not extend to any part of the cost paid or the expense incurred by one of two or more parties subject to a joint liability in attempting to defend himself against the claim, unless authorized by those who are jointly liable: *Knight v. Hughes*, 3 Car. & P. 467; *John v. Jones*, 16 Ala. 454. But this rule does not apply where the cost is recovered in a judgment against all the joint obligors, in which case the cost has become a common burden, and each may recover of the others for the payment of more than his due proportion: *Boardman v. Paige*, 11 N. H. 431; *Newcomb v. Gibson*, 127 Mass. 396. Thus if the debt is not paid, and a judgment is recovered against the principal and his sureties, or against the sureties alone, and one of them pays it, he can recover one half of the costs of the suit from his co-surety. The costs cannot be distinguished from the debt, and every equitable principle which entitles a surety to contribution from his co-surety for the one applies equally to the other: *Davis v. Emerson*, 17 Me. 64; *Briggs v. Boyd*, 37 Vt. 534. And one surety paying the whole obligation after judgment may compel contribution from his co-surety for the costs, although the latter was not served with process: *Van Winkle v. Johnson*, 11 Or. 469; 50 Am. Rep. 495. And it is further held that a surety may not only recover of his co-surety a proportionate share of his costs, but also the expenses incurred in defending a suit, where the defense set up was reasonable, hopeful, and prudent: *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 98; *Wagenseller v. Prettyman*, 7 Ill. App. 197; *Downer v. Baxter*, 30 Vt. 472; compare *Comegys v. State Bank*, 6 Ind. 357. But suits against a co-surety for costs, like many other suits in equity, depend to a great extent upon the circumstances of the particular case, and considerations of right and justice, as applicable to the facts, are the controlling principle in determining the result: *Van Winkle v. Johnson*, 11 Or. 469; 50 Am. Rep. 495.

Apportionment of Contribution among Co-sureties. — If all the sureties are solvent, each is liable for his share of the sum advanced by one to relieve them all of the common burden: *Preston v. Preston*, 4 Gratt. 88; 47 Am. Dec. 717. But as a general rule, if there are several sureties, and one is insolvent, and another pays the debt, he can at law recover no more than an aliquot part of the debt, regard being had to the whole number of co-sureties, solvent and

insolvent: *Samuel v. Zachery*, 4 Ired. 377; *Powell v. Matthis*, 4 Id. 83; 40 Am. Dec. 427; *Dodd v. Winn*, 27 Mo. 501; *Stothoff v. Dunham*, 19 N. J. L. 181; *Brown v. Lee*, 6 Barn. & C. 697; 9 Dowl. & R. 700; *Batard v. Hawes*, 2 El. & B. 287; *Cowell v. Edwards*, 2 Bos. & P. 268. The rule in equity is, however, more just and reasonable, and where one of several sureties pays a debt for which all are liable, and one is insolvent, the paying surety may, in equity, compel the solvent sureties to contribute *pro rata* according to the number of such solvent sureties: *Bell v. Jasper*, 2 Ired. Eq. 597; *Couch v. Terry*, 12 Ala. 225; *Tarr v. Ravenscroft*, 12 Gratt. 642, 652; *Young v. Lyons*, 8 Gill, 162; *Burroughs v. Lott*, 19 Cal. 125; *Hayden v. Thrasher*, 18 Fla. 795; *Stewart v. Goulden*, 52 Mich. 143; *Acers v. Curtis*, 68 Tex. 423; *North v. Brace*, 30 Conn. 60, 72; *Mayor of Burwich v. Murray*, 7 De Gex, M. & G. 497. Thus if there are three sureties, and all of them are solvent, and one pays the debt, each of the others will be liable to him for one third of the amount only; but if one of them is insolvent, the other will be liable for one half: *Dodd v. Winn*, 27 Mo. 501. And it is held in some of the states that the insolvency of one or more of the co-sureties is regarded in actions at law for contribution, and that the share to be recovered by one who has paid the whole debt is to be determined by the number of solvent sureties, as in equity: *Henderson v. McDuffee*, 5 N. H. 38; 20 Am. Dec. 557; *Liddell v. Wiswell*, 59 Vt. 365; *Easterly v. Barber*, 3 Thomp. & C. 421. And it has been held that removal from the state is for this purpose equivalent to insolvency: *Boardman v. Paige*, 11 N. H. 431; and see *Stewart v. Goulden*, 52 Mich. 143.

If sureties are bound for the same thing, but there are several distinct obligations with different penalties, contribution between the sureties is in proportion to the penalties of the obligations respectively signed by them: *Armitage v. Pulver*, 37 N. Y. 494. Compare *Young v. Shunk*, 30 Minn. 503; *Burnett v. Millsaps*, 59 Miss. 333. A surety having paid the debt in property, he has no claim on the principal or on a co-surety for the value of the property, but only for the amount of the debt: *Hickman v. McCurdy*, 7 J. J. Marsh. 558. So if he has paid in depreciated paper, he is entitled to remuneration only to the extent of the value he actually paid: *Crozier v. Grayson*, 4 Id. 517; but interest may be added: *Miles v. Bacon*, 4 Id. 463; *Edmonds v. Sheahan*, 47 Tex. 443. If one surety buys in the common debt for less than its nominal amount, he can only claim contribution of a co-surety for the amount actually paid by him: *Tarr v. Ravenscroft*, 12 Gratt. 642; *Sinclair v. Redington*, 56 N. H. 146; and see *Blow v. Maynard*, 2 Leigh, 29. And a paying surety can recover no more of a co-surety than his proportion, although the latter be indemnified by the principal against the whole debt, unless he has undertaken to pay it at all events: *Taylor v. Savage*, 12 Mass. 98. See *Hinsdill v. Murray*, 6 Vt. 136. When by the conduct of the creditor a co-surety has been released from liability, another co-surety will be held exonerated only as to so much of the original debt as the one so discharged could have been compelled to pay: *Morgan v. Smith*, 70 N. Y. 537.

Remedies for the Recovery of Contribution.—Originally, the appropriate remedy of a surety who had paid the debt to recover contribution from his co-sureties was by proceedings in equity: *Powell v. Matthis*, 4 Ired. 83; 40 Am. Dec. 427; *Couch v. Terry*, 12 Ala. 225; *Brown v. Lee*, 6 Barn. & C. 697. But courts of law afterwards assumed jurisdiction in the matter, and it has been long settled that if one surety pays the whole debt, or more than his part, he has a right to recover at law a contribution against his co-surety: *Cowell v. Edwards*, 2 Bos. & P. 268; *Blake v. Cole*, 22 Pick. 97; *Bachelor v. Fiske*, 17 Mass. 468; *Foster v. Johnson*, 5 Vt. 60; *Jeffries v. Ferguson*, 86 Mo. 244.

And it has been held that the right of action in such cases arises out of a contract implied in law to contribute among the sureties a ratable proportion of the amount for which all are liable; *Bagott v. Mullen*, 32 Ind. 332; 2 Am. Rep. 351. The equitable obligation to contribute having been established, the law raises an implied *assumpsit* on the part of the co-surety to pay his share of the loss resulting from a concurrent liability to pay a common debt: *Russell v. Failor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669; *Liddell v. Wiswell*, 59 Vt. 365; *Mason v. Lord*, 20 Pick. 447. The remedy existing at law for enforcing contribution from co-sureties is usually resorted to when the case is not complicated, and such remedy does not affect the more extensive and efficient jurisdiction of a court of equity: *Couch v. Terry*, 12 Ala. 225; so that a surety who has paid his share of the principal's debt may sue in equity to enforce contribution from his co-sureties, although he also has a remedy at law: *Handley v. Heflin*, 84 Id. 600; *Broughton v. Wimberly*, 65 Id. 519. And where the remedy at law has been conferred by statute, equity still retains concurrent jurisdiction: *Carrington v. Carson*, Cam. & N. 216; and see *Lansdale v. Cox*, 7 T. B. Mon. 405; *January v. January*, 7 Id. 544; 18 Am. Dec. 211; *Mitchell v. Sproul*, 5 J. J. Marsh. 270. In some of the states a summary remedy for enforcing contribution between co-sureties is given by statute: See *Rutherford v. Smith*, 27 Ala. 417; *Owen v. Owen*, 3 Humph. 325; *Riley v. Rhea*, 5 Lea, 115; *Burke v. Mutch*, 66 Ala. 568.

Parties to Suit or Action for Contribution. — If several are sureties, and all but one pays the debt for which all became liable, the paying sureties may maintain a joint action for contribution against the one who failed to pay his proportion, provided they jointly paid the money: *Dussol v. Bruguere*, 50 Cal. 456. But where several sureties pay the debt, and there is no evidence of a partnership or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion, and a joint action cannot be maintained: *Lombard v. Cobb*, 14 Me. 222; *Prescott v. Newell*, 30 Vt. 82. Compare *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387, holding that sureties may join in an action to recover from a co-surety the amount paid for his benefit, when, each being liable for the full amount, they joined in making the payment by a contribution agreed on among themselves for that purpose; and see *Hadsell v. Hancock*, 3 Gray, 526. At law, a surety cannot maintain a joint action against his co-sureties to recover their share of the liability, but each must be sued separately for his own liability: *Powell v. Matthis*, 4 Ired. 83; 40 Am. Dec. 427. In equity, all parties whose rights are affected should be joined: See *Rainey v. Yarborough*, 2 Ired. Eq. 249; *Fletcher v. Jackson*, 23 Vt. 581; 56 Am. Dec. 98; but an insolvent principal and insolvent co-sureties are not necessary parties: *Johnson v. Vaughn*, 65 Ill. 425; and if some of the co-sureties are without the jurisdiction of the court, the plaintiff, by stating that fact in his bill, may proceed against those within its jurisdiction: *Jones v. Blanton*, 6 Ired. Eq. 115; 51 Am. Dec. 415; *Currier v. Baker*, 51 N. H. 613.

Matters of Defense in Suit or Action for Contribution Generally. — The right to contribution among sureties rests in natural equity, and if a party seeks to recover upon principles of natural equity, the defendant may plead the same in his defense: *Dennis v. Gillespie*, 24 Miss. 581; and see *Wells v. Miller*, 66 N. Y. 255; *Preston v. Preston*, 4 Gratt. 88; 47 Am. Dec. 717. The real relations of the parties may therefore be proved for the purpose of establishing a defense: *Crosby v. Wyatt*, 23 Me. 156; *Clapp v. Rice*, 13 Gray, 403; 74 Am. Dec. 639; *Paulin v. Kaighn*, 27 N. J. L. 503. It is

held that a co-surety sued for contribution may set off a debt due him from the plaintiff: *Long v. Barnett*, 3 Ired. Eq. 631; and that it is a good defense to show that the plaintiff was indebted to the principal debtor in a greater sum than he paid as surety: *Bezell v. White*, 13 Ala. 422. But see *O'Blenis v. Karing*, 57 N. Y. 649, holding that in an action by a surety against his co-surety for contribution the latter cannot defend by setting up, by way of counterclaim, recoupment, or set-off, a cause of action existing in favor of the principal against the plaintiff.

A promise by the surety suing for contribution to hold his co-surety harmless is a defense: *Blake v. Cole*, 22 Pick. 97; *Apgar v. Hiler*, 24 N. J. L. 812; so a release or abandonment of security is a defense *pro tanto*: *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747; *Roberts v. Sayre*, 6 T. B. Mon. 188. So a surety is not bound by a judgment recovered against his co-surety if he had no notice of the suit, and he may show in a suit for contribution any legal defense which he might have pleaded in bar of a suit against him upon the obligation: *Briggs v. Boyd*, 37 Vt. 534; and see *Lowndes v. Pinckney*, 1 Rich. Eq. 155; but he cannot show either a total or partial failure of consideration as between the original parties: *Briggs v. Boyd*, 37 Vt. 534; *Cave v. Burns*, 6 Ala. 780. A surety on an official bond who aids the principal in a breach thereof cannot recover contribution from a co-surety for the consequent damages: *Scofield v. Gaskill*, 60 Ga. 277; *Healey v. Scofield*, 60 Id. 450. If one of two sureties pays the judgment against their principal, takes out execution thereon, procures a sale of the principal's property, becomes a purchaser of it at nominal prices, and then sues his co-surety for contribution, the latter may show that the property so purchased was fairly worth enough to satisfy the judgment: *Sanders v. Wheelburg*, 107 Ind. 266.

As a general proposition, a *prima facie* case for contribution is made out when it is shown that one of two joint debtors had paid more than a moiety of the debt, and facts which rebut the presumed equity to contribute should be set up by way of defense, and need not be negatived in a complaint for contribution: *Gaster v. Waggoner*, 26 Ohio St. 450; and compare *Hichborn v. Fletcher*, 66 Me. 210; 22 Am. Rep. 562; *Newcomb v. Gibson*, 127 Mass. 396; *Wells v. Miller*, 66 N. Y. 258. See, as to the sufficiency of a complaint by a surety to recover contribution from the estate of his co-surety, deceased, *Van Demark v. Van Demark*, 13 How. Pr. 372.

When Statute of Limitations Bars Claim for Contribution. — The right of action between co-sureties for contribution accrues when one surety pays more than his portion of the liability, and the statute of limitations begins to run from that time, and not from the time the debt for which they are liable becomes due: *Reeves v. Pulliam*, 7 Baxt. 119; *Cocke v. Hoffman*, 5 Lea, 105; 40 Am. Rep. 23; *Cochran v. Walker*, 82 Ky. 220; 56 Am. Rep. 891; *Robinson v. Jennings*, 7 Bush, 630; *Preslar v. Stallworth*, 37 Ala. 402; *Singleton v. Townsend*, 45 Mo. 379.

PENNEGAR AND HANEY v. STATE.

[87 TENNESSEE, 244.]

MARRIAGE AND DIVORCE — MARRIAGE VALID WHERE CELEBRATED IS, IN GENERAL, VALID EVERYWHERE. — Exceptions to or modifications of the general rule are, — 1. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2. Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication.

MARRIAGE AND DIVORCE — CONFLICT OF LAWS. — Where statutory prohibition in respect to marriage relates to form, ceremony, and qualification merely, compliance with the law of the place of marriage is sufficient, and the validity of the marriage will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile.

MARRIAGE AND DIVORCE — INVALIDITY OF MARRIAGE CELEBRATED IN ANOTHER STATE. — Under Tennessee statute (Milliken and Ventrees's Code, sec. 3332), a marriage between the guilty husband or wife, after a divorce for adultery, and the person with whom the crime was committed, is prohibited during the life of the former consort; and if the contracting parties in such case, being citizens and residents of Tennessee, withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the statute in question, enacted in pursuance of a settled policy of the state, in the interest of public morals, peace, and good order of society, such marriage is void in Tennessee, though valid in the state where celebrated.

Webb and Avant, for the plaintiffs in error.

G. W. Pickle, attorney-general, for the state.

FOLKES, J. The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this court.

The record discloses the following facts: E. N. Haney was divorced from her husband, John Haney, by a decree of the circuit court of De Kalb County, upon the petition of the husband charging her with adultery with William Pennegar. The decree adjudged the charge fully proven, and the divorce was granted the husband solely upon such charge.

The divorced wife and the partner in her guilt, shortly after the divorce, went to Jackson County, state of Alabama, where they were married to each other, and on the next day after their marriage, returned to De Kalb County, in this state, the place of their former and present residence, where they have been living and cohabiting openly and publicly as man and wife, all within twelve months before the indictment found in this case, the divorced husband, John Haney, still living.

Section 3332 of Milliken and Ventrees's Code enacts: "When

a marriage is absolutely annulled, the parties shall severally be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed during the life of the former husband or wife."

The marriage, being prohibited by statute, is void if solemnized in this state: *Bishop on Marriage and Divorce*, secs. 46, 223; *Carter v. Montgomery*, 2 Tenn. Ch. 225; *Owen v. Bracket*, 7 Lea, 448.

In the last case cited, this court held the woman was not entitled to homestead where the marriage was had in this state in violation of the statute quoted above.

It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the paramour.

The question, therefore, presented in this record is, whether citizens of this state, prohibited by the statute referred to from marrying, can, by crossing over into a sister state, where such marriages are not inhibited, claim the benefit of the marriage there contracted when they return at once to this state, having left it for the manifest purpose of evading our statute.

The question is of first impression in this state, and one not free from difficulty, by reason of certain well-established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says "a marriage valid where solemnized is valid everywhere." Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result, to some or both of which we will refer later on.

Before doing so, let us see what are the general principles controlling in cases of this character. Marriage is an institution recognized and governed, to a large degree, by international law prevailing in all countries, and constituting an essential element in all earthly society.

The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demand that one state or nation shall recognize the validity of marriage had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise.

It may be said, therefore, to be a rule of universal recognition in all civilized countries that, in general, a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself.

These exceptions or modifications of the general rule may be classified as follows: 1. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2. Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication.

To the first class belong those which involve polygamy and incest; and in the sense in which the term "incest" is used is embraced only such marriages as are incestuous according to the generally accepted opinion of christendom, which relates only to persons in direct line of consanguinity and brothers and sisters.

The second class—i. e., those prohibited in terms by the statute—presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: 1. Where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced of "valid where performed, valid everywhere."

To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy as affecting the morals or good order of society.

It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead, dower, and the rights of property, in the

face of the conclusions of approved text-writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color.

Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society to that degree which will render it proper to disregard the *jus gentium* of "valid where solemnized, valid everywhere."

The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed or between parties who left the state of domicile for the purpose of avoiding its statute, when they come or return to the state; and some of the states have in terms legislated on the subject.

Where, however, the legislature, as in our own state, has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has, in the particular case, contented itself with merely prohibiting such marriages, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other state is valid or void when the parties come into this state.

If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*.

Thus in *State v. Bell*, 7 Baxt. 9, 32 Am. Rep. 549, this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage.

This case is distinguishable from the case at bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages be-

tween whites and blacks, passed in 1870 in amendment of the act which prohibited such marriages theretofore, and by the very pronounced convictions of the people of this state as to the demoralization and debauchery involved in such alliances.

The decision in the above case is so manifestly in keeping with sound principles now well established that it need not be here fortified by citation of authority. But we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage solemnized in Rhode Island (where it was legal) between persons domiciled there would be valid in Massachusetts, but that it was valid in the latter state where the parties had left Massachusetts, and gone into Rhode Island, for the express purpose of evading the Massachusetts law prohibiting such marriage, and returned to Massachusetts: *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131.

This was certainly carrying the doctrine of "valid where performed, valid everywhere," to an extreme limit. The case has been much criticised, — more so, indeed, than it deserves, as it seems to us; for while to our mind the result is startling, it is not out of harmony in its argument with the principles we have stated. The learned judge, delivering the opinion, in speaking of the exception to the general rule, says. "Motives of policy may likewise be admitted into consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a state where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency, that others which would tend to outrage the principles and feelings of all civilized nations would be countenanced."

So that the difference between this case and *State v. Bell*, *supra*, is a difference in "motives of policy" and ideas of "political expediency." We do not think, therefore, that the case is open to the criticism passed upon it by the lord chancellor in *Brook v. Brook*, 9 H. L. Cas. 193, which case is itself, with equal propriety, criticised by Gray, C. J., in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, which contains a very able and elaborate review of the subject under

consideration. Though unable to concur in some of the arguments, and especially with the *dictum* that "a marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, *even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here.*"

Of course we refer to so much of the above as we have italicized, for it is the purest *dictum*, it being a case where there was no proof of an intent to evade the laws of Massachusetts, as is shown by the judge himself, who concludes his opinion as follows: "Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another state according to its laws, at least without proof that the parties went into that state, and were married there with the intent to evade the provisions of the statutes of this commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment was in due form."

This case being an indictment for polygamy, where a wife, having obtained a divorce on account of the husband's adultery (in which case he was prohibited from marrying again without leave of the court), the husband married another woman in another state, without proof that the second wife ever resided in Massachusetts prior to her marriage, and without proof of a purposed evasion of the Massachusetts law.

Recurring for a moment to the case of *Medway v. Needham*, *supra*, it may well be that, recognizing and applying the same general principles, the courts in different states may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective states may differ in matters of public policy, and if not of "political expediency."

What might be deemed a mere regulation in one state might be regarded as a matter vitally affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law by reason of the conflict in the reported cases from different states and nations is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened courts, the different results reached being due to the statutory enactments of the different states, as construed by courts thereof, who interpret the meaning,

intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the state, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactments, or by the manifest and distinctive policy of the state as understood by the courts.

Now, believing as we do that the statute in question which we are called upon to construe in the case at bar is expressive of a decided state policy not to permit the sensibilities of the innocent and injured husband or wife who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce to be wounded, nor the public decency to be affronted by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of evading our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion, it is doubtless unnecessary to say that, in reaching the conclusion just announced, we do not intend in the slightest degree to encroach upon the principle which recognizes as valid marriages had in other states, where the parties have gone to such other states for the purpose of avoiding our own laws in matters of form, ceremony, or qualification merely; but confining ourselves to the facts of this case, we hold that where citizens of this state withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the statute in question passed in pursuance of a determined policy of the state in the interest of public morals, peace, and good order of society, such parties, upon their return to this state, and cohabiting as man and wife, are liable to indictment in the courts of this state for lewdness.

The case of *Dickson v. Dickson*, 1 Yerg. 110, 24 Am. Dec. 444, has no concern with the point adjudged in the case at bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that state permitted to marry again, might contract a valid marriage in this state prior to the act of 1835, which for the first time prohibited such marriages; and having come to this state in good faith,

married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is, that notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they removed there in good faith, which would be valid in that state.

Putnam v. Putnam, 8 Pick. 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, decided ten years before, which the court said was "binding upon it and the community until the legislature shall see fit to alter it." While speaking of *Medway v. Needham*, *supra*, the opinion continues: "The court were aware of all the objections to the doctrine in that case, and knew it to be *veraxata quæstio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage which by the laws of the country where it was entered into was valid."

It is manifest that the effort to fortify *Medway v. Needham*, *supra*, by assuming that it is based on the law of England, must fail, if the house of lords are competent to testify as to the state of the law in England on the subject; for we find that in *Brook v. Brook*, 9 H. L. Cas. 219, the lord chancellor, in speaking of the case of *Medway v. Needham*, *supra*, as we have already seen, says: "It is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage," and adds: "If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants in that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful."

This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English court does not hold to the principle upon which it is claimed by the Massachusetts court the *Medway* case is based. But, with due

deference, we must be permitted to say that the decision in the case of *Brook v. Brook*, *supra*, goes further than we think the principle announced requires, — further, at least, than we would be inclined to go, — when, as was done in that case, it was held that, while both were resident in England, the man married his deceased wife's sister in Denmark, where such marriage was legal, and returning to England, the marriage was void there, because a marriage between parties so related was contrary to the laws of England. Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of christendom, and it would seem that, under the policy of many of the states of this Union, such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the courts of that country would doubtless be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer — since the clause prohibiting such marriages was, upon the argument of Lord Palmerston that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the House of Commons — as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to *Putnam v. Putnam*, *supra*, to note that the court in this case closes its opinion with this language, that “if it shall be found *inconvenient or repugnant to sound principle* [the Italics ours], it may be expected that the legislature will explicitly enact that marriages contracted within another state, which if entered into here, would be void, shall have no force within this commonwealth.” The legislature did shortly thereafter so enact, whether because the doctrine laid down in the case was inconvenient or because repugnant to sound principle does not appear. In our view of the law, both considerations might well have moved the legislature.

Stevenson v. Gray, 17 B. Mon. 193, is a case holding the doctrine of *Putnam v. Putnam*, *supra*, and, after what we have said about the latter case, need not be further noticed here.

Van Storch v. Griffin, 71 Pa. St. 240, does not sustain the contention of counsel in the point decided, as there is nothing

in the case to show that the parties went from one state to the other for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libellant, had no extraterritorial effect; so that what is said in the opinion about going from one state to the other for the purpose of evading the law of the state granting the divorce is *dictum* pure and simple.

In full accord with the conclusion we have reached in the case at bar is *Kinney v. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690, where it was held that a marriage between a negro and a white person had in the District of Columbia for the purpose of evading the law of Virginia was void upon the return. To the same effect, see *State v. Kennedy*, 76 N. C. 251; 22 Am. Rep. 683; *Scott v. Scott*, 39 Ga. 321; *Dupre v. Bulard*, 10 La. 411.

The intention to evade the law by going into another state was made the test of its validity in North Carolina, as will be seen by reference to the two cases of *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683, above cited, and *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678, —both marriages between a white person and negro. In *Kennedy's* case, such intention being shown, the marriage was held void; while in *Ross's* case, it being shown that there there was no intent to return to North Carolina, though the parties afterward did so, the defendant was held not guilty of fornication. This was, however, by a divided court, and is contrary to our own case of *State v. Bell*, 7 Baxt. 9; 32 Am. Rep. 549.

We conclude this opinion, already too long, by a reference to *Williams v. Oates*, 5 Ired. 535, where Chief Justice Ruffin, in delivering the opinion of the court in a case very similar to our own, says: "Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country purposely to defraud them." See also Wharton's Conflict of Laws, secs. 135, 181, 182.

Let the judgment of the circuit court be affirmed.

MARRIAGE AND DIVORCE. — Generally a marriage valid where made is respected elsewhere: *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; but in Virginia, the courts refuse to recognize a marriage void under the
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laws of that state, although valid where contracted: *Greenhow v. James*, 80 Va. 636; 56 Am. Rep. 603, and note 607-610.

MARRIAGE AND DIVORCE—CONFLICT OF LAWS.—A white man and a colored woman, married according to the forms of law in Mississippi, may be indicted for living together as husband and wife under the statute of Tennessee: *State v. Bell*, 7 Baxt. 12; 32 Am. Rep. 549; and to the same effect is *Kinney v. Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 690.

MARRIAGE AND DIVORCE.—A resident of the state of Massachusetts, whose wife has, in that state, obtained a divorce for his adultery, by reason of which he is prohibited by statute from marrying again without leave of court, and who, without leave of court, and still being a resident of Massachusetts, is married to another woman in another state, according to its laws, and afterwards cohabits with her in Massachusetts while the first wife is still alive, is not liable to indictment for polygamy, unless his second wife is proved to be, at the time of her marriage, a resident of Massachusetts, and that the marriage was performed out of the state in order to avoid the statute: *Commonwealth v. Lane*, 113 Mass. 458; 18 Am. Rep. 509, and note 521, 522. A divorce granted by a court of a sister state having jurisdiction of the subject-matter and of the parties is conclusive in all the world, and the divorced parties may afterwards marry in another state, notwithstanding the laws of such sister state provided that persons divorced should not be released from the marriage contract, but be punished for bigamy upon marrying again: *Dickson v. Dickson*, 1 Yerg. 110; 24 Am. Dec. 444, and note 448.

MORROW v. NASHVILLE IRON AND STEEL COMPANY.

[87 TENNESSEE, 262.]

CORPORATIONS—INVALID STIPULATION IN CONTRACT FOR SUBSCRIPTION TO STOCK.—A stipulation in a contract with a subscriber to the initiatory capital stock of a manufacturing corporation, organized under the general incorporation laws of the state, which provides that the subscriber shall receive, in addition to his stock shares, interest-bearing bonds to an equal amount, secured by mortgage upon the company's plant, is without consideration, and is absolutely void, both as against creditors and between the subscriber and the corporation; and the failure of the corporation to carry out such illegal stipulation does not release the subscriber from liability upon his subscription.

CORPORATIONS.—**STIPULATION IN CONTRACT OF SUBSCRIPTION** to organization or initiatory stock of corporation to issue bonds to the subscriber to the full amount of his subscription, secured by first mortgage on the company's plant, is not to be regarded as a condition precedent to liability upon the subscription, and is nothing more than an independent stipulation, for the breach of which the remedy would be in damages, in a case where the subscriber paid part of his subscription in cash, giving notes for the balance, to be paid upon call, and having become a director, after organization, without receiving his bonds, and especially as the mortgage to secure the bonds could only be obtained by payment of the fund subscribed.

CORPORATIONS.—**CONDITIONAL SUBSCRIPTIONS TO STOCK OF CORPORATIONS** are contrary to sound public policy, by reason of their tendency to mislead and ensnare creditors, and they ought not therefore to be encouraged.

* *Vertrees and Vertrees*, for the complainant.

Champion and Head, and Steger and Washington, for the defendants.

LURTON, J. The Nashville Iron, Steel, and Charcoal Company is a manufacturing corporation, organized in 1887 under the general incorporation laws of this state. Complainant's bill charges that it was organized upon the following scheme or basis, namely: "The capital stock was fixed at three hundred and fifty thousand dollars, in shares of one hundred dollars each. The company was also to issue three hundred and fifty thousand dollars of one-thousand-dollar negotiable, interest-bearing coupon bonds, to run twenty years, secured, principal and interest, by a first mortgage, in the usual form, upon the company's plant. Every subscriber was to have bonds and also stock of the company, each to the amount of the subscription,—that is to say, a subscriber to the amount say of one thousand dollars was to pay one thousand dollars, and therefor was entitled to and was to receive one thousand dollars of said bonds and one thousand dollars of said stock of the company."

Complainant alleges that "upon this basis and plan of operations, as the defendant company well knew, your orator . . . subscribed for ten thousand dollars of said stock and bonds each,—that is, he took an interest to the extent of and subscribed ten thousand dollars, and he was to pay the said ten thousand dollars upon calls to be made."

Upon this subscription he afterward paid one thousand dollars, and executed his three negotiable notes, each for three thousand dollars, and payable in March, April, and May, 1888. Subsequently, the corporation refused to carry out the scheme by which subscribers were to receive bonds to an amount equal to their stock, and, instead, resolved to mortgage their property only to the extent of one hundred thousand dollars, and these bonds they resolved to sell upon the market, applying the proceeds to corporate purposes strictly. This change in the plan of operations seems to have been assented to by all of the subscribers save complainant, who caused his protest to be entered.

The bill alleges that the notes executed by complainant have been transferred to the Commercial National Bank in payment of a pre-existing debt, with notice of the consideration upon which they were executed. This change, the case

being heard upon demurrer, together with the fact that the insolvency of the iron company does not appear, justifies us, for the purpose of this case, in treating the bank, as the holder of these stock notes, as standing upon no higher ground than the assignor.

The complainant seeks to be relieved from his subscription upon the ground that the company has refused to carry out its agreement concerning its bonds; that his notes be canceled, and that he have a decree for the money paid in on his subscription. He further prays, in the event he be held liable upon his subscription, that the contract by which he was to receive bonds be specifically performed.

The bank and the iron company join in a demurrer, which questions the validity and legality of the contract by which the complainant was to receive the bonds of the company. This demurrer was sustained by the learned chancellor, and the bill of complainant dismissed.

In considering the meaning and legal effect of the contract set up by the complainant, it is important at the outset to observe that this is not the case of a purchase of stock and bonds, or either, in an organized and going corporation. Upon the contrary, the bill states that the contract into which complainant entered was that upon which all shares were to be issued, and that the contract between himself and the corporation constituted what the pleader properly designates the "basis of organization."

Whether this "basis of organization" be construed to be a contract whereby each subscriber to the stock was to be given a bond as a bonus, or each subscriber to the bonds was to be given paid-up stock as a bonus, or as an agreement by which each contributor to the capital stock was to receive the obligation of the company, secured by a primary mortgage, that he should be repaid the amount of his subscription with interest, such an agreement would clearly be illegal and ineffective as to existing or subsequent creditors of the corporation, either upon the ground that the payment for the stock was unreal and simulated, or that the bond had been issued upon no consideration: *Morawetz on Corporations*, sec. 824; *Sawyer v. Hoag*, 17 Wall. 610; *Scovil v. Thayer*, 105 U. S. 143.

The learned counsel for complainant has very ably and earnestly presented the well-understood distinction between contracts which are invalid as to creditors, and yet are legal and binding upon the corporation,—a distinction well illus-

trated by the cases just cited from the supreme court of the United States; and he insists, upon the doctrine of these cases, that however invalid such an agreement may be as against creditors, that inasmuch as all the subscribers to shares were parties to the same agreement with the corporation, that the arrangement and contract cannot be questioned by such stockholders or by the corporation, and that as between the subscriber and the company the agreement is legal and binding.

This presents a question of great importance, and one which is entitled to receive grave consideration at our hands. There are undoubtedly a class of cases where subscriptions to initiatory stock upon special terms, not prohibited by the charter, and not in contravention of any clearly defined public policy, have been, upon sound principles, held valid as between the subscribers and the corporation, and yet invalid in so far as the rights of creditors were affected upon a condition of corporate insolvency ensuing. To this class of cases belong the cases of *Sawyer v. Hoag* and *Scovil v. Thayer, supra*. The invalidity of the special terms upon which the contract of subscription rested in these two cases arose from the well-settled doctrine that unpaid stock subscriptions constitute a trust fund for the benefit of general creditors, and that any arrangement or device by which a payment of a stock subscription is simulated or released is void in so far as it operates to discharge a liability in favor of creditors by a subscriber to capital stock. In the first of these cases there was a contract whereby the stock was nominally paid in full, but immediately taken back as a loan to the subscriber. Now, the only effect of this arrangement was to work a change in the character of the debt, whereby a debt due as for unpaid stock was to become a debt due as for a loan. The debt in the latter case was one which was subject to offsets in the hands of the borrower, while so long as it was a stock debt it was a trust fund, and the debtor could not apply it exclusively upon his own claim against the insolvent corporation.

Concerning the validity of such an arrangement as between the subscriber and the corporation, Mr. Justice Miller said: "Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually so far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was

found mutually convenient to do so; and in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporation, could deny that the stock was paid in full."

The court, however, held that, upon a suit by the assignee in bankruptcy of the corporation, the stock had not in fact been paid in such manner as to prevent a recovery for benefit of creditors, and the defendant was not allowed to offset his liability upon his notes given for the alleged loan to him by the company by a claim he held against the corporation.

Concerning this case, it is enough to say that the validity of the arrangement as against the company could very well be rested upon the fact that such a lending of money to the share subscriber was not prohibited by the charter of the corporation, and no public policy was violated, in that the corporation had only taken the secured notes of the subscriber in place and stead of his unsecured liability as a share-holder; or these notes stood for and represented an investment of the capital of the company, and being an insurance company expressly permitted to lend out or otherwise invest its funds, no reason occurs why the company should not be regarded as bound by such a change in the character of the debt. The case, however, would be different if such loans, or any other, had been made by a manufacturing corporation under the general incorporation laws of this state, the lending of money to stockholders being expressly prohibited by such corporation.

In the case of *Scovil v. Thayer*, *supra*, the stock was subscribed upon an agreement that upon the payment of twenty per cent, paid-up, non-assessable certificates of stock should be issued to the nominal amount of the subscription. Mr. Justice Hunt, speaking for the court, said, concerning this contract, that, "as between them and the company, this was a perfectly valid agreement. It was not forbidden by the charter, or by any law or public policy, and as between the company and the share-holder, was just as binding as if it had been expressly authorized by the charter."

When he came to consider the matter as it affected creditors, he said: "But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors which they can set aside; that when their rights intervened, and their claims are to be satisfied, the stockholder can be required to pay their stock in full. The

reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contract made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will, at his instance, require it to be paid": 105 U. S. 154.

This case is differentiated from the one now under consideration in several important particulars. First, it is important to notice that the question did not arise between the corporation and the subscriber. The controversy was between subscribers and the creditors of an insolvent corporation. The point only arose because it became necessary to determine when the right of action in favor of the creditor accrued with reference to the statute of limitations which was pleaded by the stockholder. In order to defeat this defense, the court held that the arrangement was valid as to the corporation; that in equity, the meaning and effect of the agreement was this, namely: "That the stockholder should pay, say, for example, twenty dollars per share on their stock, and no more, unless it became necessary to pay more to satisfy the creditors of the company; and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required."

The court, upon this construction of this agreement, held that the statute had not begun to run until the assets of the company had proven insufficient to pay debts.

Again, the contract as between the company and the subscriber was an executed one, while here we have one executory, and which the corporation has refused to carry out.

In the third place, the court found that the charter did not prohibit such an agreement, nor was it contrary to any law or public policy of the state of Kansas, where the corporation resided, and where the contract was made. But the broadest and most obvious distinction between this case and that will be observed where we analyze the contract set up by complainant, and ascertain its legal effect, and then see wherein such a contract is prohibited by the charter of the defendant corporation, and to what extent it may contravene the public policy of this state.

The scheme proposed, upon which this corporation was to

be organized, fixed the capital stock at three hundred and fifty thousand dollars. The public has a right to presume that this stock has been in good faith subscribed, and that it will be paid. They have also the right to presume that the fund thus subscribed and paid in will in good faith be retained in the business of the company, and that it, or the plant and property represented by it, will in good faith be held and preserved as a capital and basis of credit and confidence. This much is held out to the public by the representation that its capital stock is three hundred and fifty thousand dollars. But running along with this proposition that there shall be a capital stock of three hundred and fifty thousand dollars is the additional stipulation that the property of the company, which is to be procured by means of this capital stock, is to be mortgaged to secure bonds in amount precisely equal to the whole capital stock, and these bonds, instead of being sold for their market value, and the proceeds applied to corporate uses, are to be divided out among the stockholders.

Says complainant in his bill: "Every subscriber was to have bonds and also stock of the company, each to the amount of the subscription." The result of this scheme, if it had been carried out, would have been that each subscriber would have received the obligation of the company to repay to him, with interest, his contribution to the capital stock of the company, and this obligation would have been secured by a first mortgage upon all the company's property.

It was an arrangement whereby the franchise was to be secured, and at the same time deprive the public of the security which by law they are entitled to have, and upon which the grant of the franchise depends. Whatever the real motive and purpose of the promoters of this arrangement may have been, its legal effect, if valid, would have been to have thrown all the risks and hazards of the business upon the public who should deal with it, while the contributors were to reap all possible gains, and should be secured against loss in the event the enterprise proved unprofitable.

Is a contract by which a corporation agrees to repay to the contributors of its capital stock their several contributions, and whereby such contributions are converted into corporate debts, valid even as against the corporation? Upon what consideration does such an agreement rest? and what power has a corporation to bind itself by such a contract?

It is true, creditors out of the way, that the assets of a private business corporation belong, in the last analysis, to the stockholders, and that they may, by consent, cease business, and divide the property among themselves. But this ownership of assets is subject to the higher and superior rights of creditors, and, as against them, share-holders have no rights in these assets. No consent of the corporation or of its share-holders can effectually defeat the prior and superior claims of creditors to the corporation property. Upon the winding up of such a corporation, creditors must first be paid. The surplus belongs to the stockholders, and this the corporation is bound to divide among them. But by this contract, the corporation, in effect, binds itself to return the capital stock to the share-holders at a fixed time,—that is, when the bonds mature,—regardless of the rights of creditors, and without winding up the business. More than this, the charter expressly forbids the payment of any dividend which impairs capital stock; yet, by this arrangement, dividends are to be paid under the guise of interest, regardless of its effect upon the capital stock of the company.

It is no answer to say that the invalidity of such bonds as to creditors saves all their rights, and that therefore the corporation ought to be suffered to make such contract with its share-holders as it pleases. This argument ignores two very plain considerations: 1. The fact that a defense could not be made by creditors against these bonds if they should pass into the hands of innocent purchasers for value; 2. The public policy of this state, as is evident from its legislation concerning such corporations, forbids the recognition of such an agreement.

The theory upon which the state has rendered the acquirement of the franchise to be a corporation so speedy and inexpensive is based upon the assumption that the capital stock, which the company holds itself out as having, will be in fact paid in, and will stand as a basis of credit instead of individual liability of those associated in business. To secure a corporate capital which shall be a just substitute for personal liability, the law requires, in explicit terms, that nothing shall be received in payment of the capital stock of a manufacturing corporation but cash, or bonds, or patent rights at a fair and agreed valuation. The charter further prevents the creation of debts beyond the capital stock; it prohibits the lending of money to share-holders, or the payment of dividends in ex-

cess of actual profits. The plain and obvious meaning of all these requirements, in the light of the substitution of corporate liability in the place of personal liability beyond the amount of stock subscription, implies that the organization stock shall be paid up in full at its par value. The courts have not hesitated, either in this state or elsewhere, to denounce every stratagem and device by which the payment of stock subscriptions is sought to be avoided.

The facility with which charters are now obtained, the wonderful increase in the number and powers of such organizations, the facilities afforded by the assumption of corporate powers and franchises, to bad and designing men to carry out evil and fraudulent schemes, whereby the public are to suffer, the plainest principles of common honesty and of business integrity demand that these business corporations shall be held to the utmost good faith in this matter of capital stock, and that all such arrangements as that proposed by this "plan of organization" shall be held void and illegal in that it is prohibited by any fair construction of the corporate powers, and in contravention of the plainest and most obvious principles of public policy concerning such companies. Such a contract, being prohibited by law, is therefore beyond the power of the corporation, and is void as to the company, being *ultra vires*.

What we have said as to the construction and legal effect of the subscription involved in this case is not intended to apply to sales of or subscriptions to the stock of an organized and going corporation, or the sale of the bonds of a going corporation. The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So—a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed or even equal the par value of either. In such case, all questions of fraud aside, a purchaser would only be held for his contract price. The case we have been considering is that of the issue of the initiatory or organization stock, — that class of stock which is to constitute

the capital stock upon which the grant of the franchise depends.

Says Mr. Morawetz: "It is evident, therefore, that the issue of certificates for paid-up shares to a share-holder whose shares have not in fact been paid up is unauthorized; it would be a direct infringement of the rights of all existing share-holders in the company, and a source of fraud upon persons giving the company credit, or dealing in its shares thereafter. However, after the capital of a corporation has been reduced by losses, it would not be a wrong against the existing share-holders to issue certificates for paid-up shares, on payment of less than their par value. Under these circumstances, fairness and equality would merely require that the new shares be issued at their actual or market value. If shares in a corporation could in no case be issued at less than their face value, it would be practically impossible to increase the capital of an incorporation by the sale of new shares after the value of its shares had fallen below par": Morawetz on Corporations, sec. 306.

The corporation having refused to execute this agreement requiring it to issue its bonds to the subscribers for stock, and having determined that such a contract was void and illegal,—as beyond the power of the corporation,—it cannot, therefore, be specifically executed.

This brings us to a consideration of the question as to whether the refusal of the corporation to execute this illegal agreement relieves complainant from his liability as a subscriber to the capital stock of this company.

His subscription cannot be regarded as one upon a condition precedent. He subscribed, not upon condition that before he should be required to pay the shares and bonds should be delivered to him. On the contrary, his bill shows that he has already paid one thousand dollars upon his liability, and executed his negotiable notes for the remainder; and he states that he was to pay his subscription "as calls" should be made. He clearly contemplated that his subscription should be paid before any bonds were to be issued; for the bonds were to be secured by a mortgage of the company's plant, and this could not be created except upon the supposition that the capital stock should be paid in, and then invested in a plant, which was to be mortgaged to secure the bonds. Where a subscription is taken distinctly upon the condition that it is not to be binding until a stipulated thing is done,

then such a subscriber does not become a stockholder, and is not entitled to the rights or charged with the burdens of a stockholder until the condition has been complied with. This court said, concerning conditional subscriptions: "The capital of stock companies consists of their stock subscriptions. This is the basis of credit, and an essential to organization. This is a trust fund for the benefit of creditors in case of insolvency. Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It misleads creditors, and is the fruitful source of litigation and disaster. Tending to the ensnarement of creditors, and contrary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged": *Railroad v. Parks*, 2 Pickle, 560.

In that case, the subscription was payable one fourth when the railway was completed to the county line; remainder in four equal installments as the work progressed through the county, upon the proviso that the company established a depot at Newbern. The company failed before a depot was established at Newbern, and it was insisted that the subscription was thereby avoided. This court held that the subscription became absolute upon completion of the road to the county line; that the proviso that a depot should be established at Newbern was not a condition precedent, but an independent stipulation; that the acts to be done were to be done at different times, and hence were independent stipulations, and the remedy of the subscriber was for a breach of the stipulation in his favor.

A condition subsequent is thus defined by Mr. Cook in his work on stockholders: "A subscription on a condition subsequent contains a contract between the corporation and the subscriber, whereby the corporation agrees to do some act, thereby combining two contracts,—one the contract of subscription, the other an ordinary contract of the corporation to perform certain specified acts. The subscription is valid and enforceable, whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy": Cook on Stockholders, sec. 78.

That Dr. Morrow's purpose was to become a share-holder

cannot be doubted. The company regarded him as such, and he so regarded himself, for he not only acted as a stockholder, but became a director of the corporation. Says Mr. Morawetz: "If it appears that the subscriber intended to become a member of the corporation, and as such entitled to vote at meetings and otherwise enjoy the privileges of membership, it is clear that the subscription cannot be deemed a subscription upon a condition precedent": Morawetz on Corporations, sec. 89.

It follows from all that we have said that the stipulation concerning the issuance of bonds to subscribers for capital stock was not a condition precedent to liability upon the subscription. It was nothing more than an independent stipulation, for the breach of which the remedy would be in damages. The failure of the company to carry out this collateral agreement does not defeat liability upon the subscription. This breached covenant or independent contract was, however, illegal and void, whether regarded as a condition precedent or subsequent, and for such breach no action would lie.

It follows, inasmuch as complainant is liable, in equity and at law, upon his subscription, that there is no equity whatever in his bill, and the decree dismissing it with costs is affirmed.

CORPORATIONS — SUBSCRIPTIONS UPON CONDITION: See monographic note to *Parker v. Thomas*, 81 Am. Dec. 398, 399. Where certificates of stock in a corporation were issued and paid for under a contract in writing agreeing to subscribe therefor, and reserving to the subscriber the right to withdraw the money paid, and have the subscription canceled, the contract was void as to subsequent subscribers: *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; 22 Am. Rep. 199; compare the recent case of *Paducah etc. R. R. Co. v. Parks*, 86 Tenn. 560.

GRISSOM v. COMMERCIAL NATIONAL BANK.

[87 TENNESSEE, 350.]

BANKS AND BANKING — RELATION BETWEEN DEPOSITOR AND BANKER is merely that of debtor and creditor, where the deposit is not special. The money deposited in the ordinary course of business is at once blended with the general funds of and becomes the property of the bank, and the depositor has only a debt against the bank payable on demand, upon the presentation and surrender of a draft or order, commonly known as a "check," addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer.

BANKS AND BANKING. — BANK HAS NO AUTHORITY TO PAY TO THIRD PARTY a note made payable at its place of business, simply because of the fact

that the maker has funds on deposit in the bank sufficient for that purpose, in the absence of any usage, course of dealing, or previous instructions from the maker to that effect. Distinctions between notes and checks pointed out.

BANKS AND BANKING. — **CUSTOM OR USAGE OF BANK**, to be binding, must be general as to place, and not confined to any particular bank or banks. It must be certain and uniform, and be known to both parties, as they are presumed to contract with reference to it.

BANKS AND BANKING — **ESTOPPEL OF BANK TO CLAIM SET-OFF AGAINST DEPOSIT.** — If, without authority, a bank pays to a third person a note on which its depositor is accommodation indorser, it will not be permitted to rely upon such payment as a set-off against the depositor, where, by reason of its failure to give notice of the payment, the indorser has lost recourse over on the party primarily liable.

Stokes, Parks, and Stokes, for the appellant.

Champion and Head, for the respondent.

FOLKES, J. This is a bill brought by complainant to recover of the defendant the sum of one thousand dollars, claimed as a balance due after crediting the bank with all checks drawn against sundry deposits made therein by the complainant as a customer of the bank.

The defendant interposes two defenses. It admits that between May 1, 1886, and July 27, 1887, the complainant made deposits with it in sundry sums, aggregating \$5,134.05, but says that it has paid out the same, for and on account of complainant, upon sundry checks, except as to \$1,000, which it says was paid upon and in discharge of a note of complainant for that amount, made and dated at Nashville, March 26, 1887, and payable sixty days after date to the order of J. D. Carter & Co., at the Commercial National Bank, Nashville, indorsed by J. D. Carter & Co., and by John F. Wheless, the latter of whom, as the owner and holder thereof, placed the same in the Fourth National Bank of Nashville for collection; that on May 28, the last day of grace, the note was, by the Fourth National Bank, presented for payment at the defendant's banking-house, where it was marked "good" by defendant, and was, on May 30th, paid by defendant to the Fourth National Bank, and the amount thereof charged up to complainant in the same manner as though it had been a check drawn by complainant.

It claims that it was and is the custom of the banks in Nashville, where notes are made payable at a particular bank, to pay such notes when the maker has sufficient funds to his credit for that purpose, without instructions, and to charge the same to the general account of the maker.

It also insists that, independent of custom, it has the right to treat a note so made as the equivalent of a check, and as a direction, therefore, on the part of the maker, to pay same on his general account as a depositor.

The chancellor found both defenses in favor of the bank, and dismissed the bill. Complainant has appealed, assigning errors. We will consider first the matter of custom. The defendant introduces the testimony of the officers of four banks in the city of Nashville, who say that such a custom, with certain modifications and variations, prevails at their respective banks, and, so far as they know, at the banks in the city generally. But these witnesses are not agreed as to the manner of exercising the usage. Mr. Porterfield, of the defendant bank, says it is the custom with his bank to pay such notes, unless on their face they appear to have been given for land, in which event they are not paid.

Mr. Williams, of the First National Bank, says that while the habit of his bank was to pay such notes, they did not pay land notes, nor where there was "some complication" about them. Mr. Keith, of the Fourth National Bank, proves that it was the custom of his bank to pay such notes, and that he knows of no exceptions to the rule, although his bank may have made some. Mr. Jones, of the American National Bank, says that it is the custom with his bank to pay such notes if given by mercantile men, but where given by men not so engaged they ask for instructions before paying; and that, immediately upon paying a note under the usage referred to, his bank always gave written notice to the depositor that such payment had been made. If the custom of this last bank as to giving notice had been followed by the defendant bank, it is probable that this suit would never have been brought, as the complainant would have had opportunity of protecting himself by recourse over on the parties for whom he was accommodation maker, as will appear later on.

It is clearly proven that such a custom was not known to this complainant, who was a lumber-man, living in a small town in the state of Kentucky, two or three hundred miles from Nashville.

From what has already been stated as to the proof on this subject, it is clear that the defendant cannot justify its payment of the note in question upon the ground of custom.

It is well settled that, to be binding, a custom must be general as to place, and not confined to any particular bank or

banks; it must be certain and uniform, and there must be reasonable ground to suppose that the custom was known to both parties to the contract, as it is upon this supposition that the parties are presumed to have contracted with reference to it: *Dabney v. Campbell*, 9 Humph. 686; *Saint v. Smith*, 1 Cold. 52; *Adams v. Otterbach*, 15 How. 545; Morse on Banking, ed. 1888, sec. 9.

Having failed, then, to show a right to pay the note upon the ground of a usage or custom binding upon this complainant, we are confronted with the proposition that, independent of usage, the bank at whose place of business a note is, upon its face, made payable, has the right to treat the note as a check, and pay same, and charge it up to the account of the maker, where such maker is a depositor of the bank.

The question is presented for the first time in this state, although it has received the attention of text-writers, and been passed upon by the courts of other states, where we find a conflict of opinion.

Under such circumstances, it is our duty to determine the question for ourselves upon reason and principle, and with a due regard for considerations of public policy and convenience, provided that, in doing so, we do not place our state in antagonism to the current of authority in this country.

We recognize the fact that it is of prime importance that the several states in this Union should, as far as may be, without doing violence to well-settled principles of state jurisprudence, endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished.

In response to this idea, we would, upon the question now before us, yield much of the strong conviction we entertain thereon, in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be found which would not threaten to engulf and destroy distinctions which have been long well settled in this state.

While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well-settled adjudications in this state upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction.

Let us see, in the first place, what is the relation between depositor and banker. It is merely that of debtor and creditor, where the deposit is not a special one. The money deposited in the ordinary course of business is at once blended with the general funds of and becomes the property of the bank; the depositor has only a debt against the bank, payable on demand, upon the presentation and surrender of the draft or order, addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a check.

Reduced to its last analysis, then, the question at issue here may be said to be: If a creditor makes a note payable to a third party at his debtor's place of business, does it operate as an order on the debtor to pay the note, in the absence of any instructions, and in the absence of any understanding or agreement growing out of the previous course of dealing between the parties?

In the absence of authority, the question would seem to carry its own answer in the negative.

In *McGill v. Ott*, 10 Lea, 147, this court has said: "A man who receives the money as agent of another cannot simply in that capacity make an application of such money to the payment of his principal's debt without the assent, expressed or implied, of the principal. The fact that the debt is due to him cannot change the principle. He was bound to account for the money to his principal, it is true, but this simply made him his debtor to that amount. If sued for it, he might, under our law, set off his debt under a plea, and then hold the money subject to such an adjustment of their rights. But this goes on the idea that each is debtor to the other, and not that one debt has paid the other."

The fact that the note was payable at the bank could not change the principle aimed at in the decision just quoted, unless we are to read the words "payable at the bank" as synonymous with the words "payable by or through the bank."

It will be admitted that there is nothing in the primary meaning nor general signification of the terms to warrant the use of the words in the sense in which they are to be understood, if the contention of defendant is to prevail.

It is equally plain that there is nothing in the origin and purpose of the words "payable at the bank," as used in notes, to justify the meaning sought to be given them.

The language is no necessary part of the instrument. It is as valid when made payable generally as when made payable at any particular place. Its purpose, as generally understood, is to designate a place where the holder may find the maker, and ascertain whether the latter is ready, able, and willing to pay the same; if not, then, having made demand at the place designated, there remains nothing for the holder to do but give notice to indorsers that such demand has been made and refused, as required by the law merchant as a condition precedent to recourse on such indorsers.

For a while in England it was held that the failure to present at the place named on the note discharged the maker, and the conflict of decision between the court of king's bench and the court of common pleas, before the decision of the house of lords in 1820, in *Rowe v. Young*, in accordance with the decision of the common pleas, reversing the judgment of the king's bench, was finally settled in 1 & 2 George IV., chapter 78, which enacted that an acceptance "payable at the house of a banker or other place" should be deemed a general acceptance, unless the words "and not otherwise or elsewhere" were added: 1 Am. Lead. Cas. 456 (364). But the almost unbroken current of authority in this country is, that, so far as the maker of a note or the acceptor of a bill is concerned, the designation of a place of payment does not make a conditional liability dependent on presentment and demand at such place, but is an absolute liability to pay generally. So that practically the insertion of the place of payment is without utility so far as the maker is concerned; and its principal, if not its sole, office, practically, in this country, now is to dispense with the inconvenience and uncertainty attending the presentment and demand upon the maker at the proper place to fix the conditional liability of indorsers. With the place of payment designated on the face of the note, no question can arise as to due diligence, etc., on the part of the holder in his efforts to make demand on the maker; he has only to present it at the place named, without regard to the residence or place of business of the maker, and if dishonored, give notice to the indorsers, and the latter become liable.

That such is the view taken by our court of the purpose and effect of such a clause in a note, see *Bynum v. Apperson*, 9 Heisk. 638, where it is said: "By making the note payable at the bank, it was fairly contemplated by the parties that the payment should be made at the bank." And in *Lane v. Bank*

of *West Tennessee*, 9 Id. 436, it is said: "And if the note be payable at a particular bank, and before the day of payment arrives that bank has no place of business, and ceases to exist, and another does business in the same room, it is sufficient to present the note for payment at their room."

While the question now under consideration was not presented nor discussed in the two cases just cited, they serve to illustrate the argument that the use of said terms in no sense converts the note into a check.

If such a clause in a note converts it into a check, or, in the language of the text-books cited by defendant, is tantamount to an order to pay same out of the funds of the maker on deposit with the bank at which the note is made payable, it would seem to follow that the failure of the holder to present same, and the subsequent insolvency of the bank with funds of maker on hand sufficient to pay same, would discharge the latter, and cast the loss on the holder, whose negligence was the occasion of the loss; and such is the holding of some of the cases which constitute, in part, the authority upon which the text-writers lay down the principle contended for here by the defendant bank. See *Lazier v. Horan*, 55 Iowa, 75; 39 Am. Rep. 167, referred to by Mr. Daniel in note 3 to section 326 a of the third edition of this valuable work, as justifying the text, in this language, "And other well-considered cases sustain this view." The "well-considered cases" are: *Lazier v. Horan*, *supra*; *Thatcher v. Bank*, 5 Sand. 130; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 88; 7 Am. Rep. 314; *Home National Bank v. Newton*, *supra*, decided by the first district appellate court, Chicago, and reported in the *Bankers' Magazine* for July, 1881, 8 Brad. App. 563, which we will presently examine.

The unsoundness of *Lazier v. Horan*, *supra*, is demonstrated in *Adams v. Hackensack Improvement Commission*, 44 N. J. L. 638, 43 Am. Rep. 406, where, after an able discussion of the authorities, it is said: "The naming of a bank in a promissory note as the place of payment does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon the banker in reference to the note, and the debtor cannot make the banker the agent of the holder by simply depositing with him the funds to pay it with."

It shows that *Lazier v. Horan*, *supra*, was decided entirely on the authority of section 229 of Story on Notes. No cases

were cited in support of the proposition, and it overlooked the holdings to the contrary in the English cases of *Sebag v. Abitbol*, 4 Maule & S. 462; *Turner v. Hayden*, 4 Barn. & C. 1.

It is also at variance with *Ward v. Smith*, 7 Wall. 447; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

The point decided in the cases last cited, while of course not conclusive of the question before us, is instructive by analogy, and establishes the unsoundness of the adjudications invoked to sustain the contrary view.

Equally unsound is the case of *Home National Bank v. Newton*, *supra*, from the district appellate court of Chicago. At least it would so appear from the statement of what it holds, as found in the note to Daniel on Negotiable Instruments, just above referred to, which is all the information we have on the subject, as we have not had access to the case. The quotation made therefrom by Mr. Daniel (vol. 1, sec. 326 a, note 3, p. 302) is as follows:—

1. "As it is the duty of the bank to pay its customer's checks when in funds, so, at least, it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank."

2. "It is a presumption of law that if a customer does so make payable, or negotiable, at a bank any of his paper, it is his interest to have the same discharged from his deposit."

3. "*The neglect of the bank to make such appropriation would discharge the indorsers and sureties.*"

4. "The act of thus making his paper payable at a bank is considered as much his order to pay *as would be his check*, and if the bank pay without express orders to the contrary, it is a defense to a suit by the depositor for money so paid."

5. "And the rule seems to be settled that if a bank *advances* the money to pay a bill or note of its customer, made payable at the bank, it may recover from the depositor *as for money loaned*, the paper so made payable being equivalent to a request to pay."

6. "He makes the bank his agent, with implied authority to protect his credit by appropriating his deposits to the payment of his maturing obligations made payable at the bank."

The Italics and the numbering of the paragraphs are ours, made for the purpose of emphasis and reference.

Now, are we willing to go this far? Must we establish as the law of this state the several propositions above announced, each akin, and logically dependent one upon the other?

Surely not, unless compelled by the overwhelming weight of authority. Does it not open a very Pandora's box of evils, rife with litigation, and most hurtful in their character? Does it not alike astonish the professional and lay mind?

Does it not introduce, by arbitrary "presumptions of law," liabilities not "so nominated in the bond," and impose upon parties to commercial paper responsibilities not contemplated by them, and hitherto unknown? Does it not inject into the every-day transactions of business men, where uniformity and certainty should be the corner-stones, elements of uncertainty and risk too grievous to be borne?

Is the liability of indorsers and sureties to depend upon the pleasure of the bank, whether or no it will appropriate the deposits of the maker to the payment of his notes, under the first and third propositions above.

If the bank should pay checks drawn on the day of the maturity of a note of the maker, in favor of itself or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter? and is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers, as to whether or not they have been thereby discharged, they, perhaps, having given notice to the bank that, unless deposits sufficient are held, they will claim their discharge?

If the bank should, under such notice, deem it safer to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of a check unpaid?

Is the maker of a note, where there has been a total failure of consideration, giving him a good defense to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward and paid the note for the maker, advancing the money therefor under the fifth proposition, authorizing the bank to treat the note made payable months before at its house as equivalent to a check or request to pay?

On the other hand, if the bank should fail to pay a note so made payable, where there were deposits sufficient, whereby the note is protested, is the bank to become a defendant to a suit for damages for injury to the credit and business of the maker, upon the authority of the sixth proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposits?

Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely, and are such as to readily suggest themselves to thoughtful men acquainted with the practical affairs of commercial life.

To hold a note payable at a particular bank as tantamount to a check on the bank is to confound distinctions heretofore established and well settled in the adjudications of this state between notes and checks.

A check is defined to be a written order on a bank directing it to pay a certain sum of money; a note is the written promise to pay another a certain sum of money at a certain time. One is payable on presentation, the other is payable on a certain day. One is entitled to days of grace, the other is not. One is an order on a third party, the other is the undertaking of the party himself. One is an appropriation of so much money in the banker's hands, the other is a promise to pay.

On the check, ordinarily, no right of action accrues until after presentment for payment; on the note a right of action against the maker exists without such presentment: *Blair v. Bank of Tennessee*, 11 Humph. 88; *Mulherrin v. Hannum*, 2 Yerg. 81; *Springfield v. Green*, 7 Baxt. 301; *Planters' Bank v. Merritt*, 7 Heisk. 190; *Brown v. Lusk*, 4 Yerg. 216.

For these and other considerations, we cannot yield our assent to the doctrine urged by the defendant, and upon which the cause was decided in the court below. We hold, therefore, that there is no implied authority for a bank to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instruction to so apply the deposits.

Nor are we without express authority to sustain this conclusion.

The supreme court of Illinois, in the case of *Wood v. Merchants' Savings Co.*, 41 Ill. 267, has reached the same result in principle. The action was on a note payable at the banking-house of Conrad. The holder presented the note, had it marked "good," but it was not paid. The bank failed, and the maker was sued on the note. The defense was that the maker had funds sufficient on deposit with the bank to pay the note; that it was the duty of the bank to have paid it when presented. The court said: "Had Conrad any authority whatever to pay the note out of the funds on deposit in his

bank to the credit of the maker? The custom sought to be established among bankers has nothing, in our judgment, to do with the question. What is the effect of making a note payable at a particular place? Was it ever before heard that the effect was to transfer, *ipso facto*, the money at the place belonging to the maker absolutely to the holder on his presenting the note at the place of payment? There is no such rule in any commercial country of which we have any knowledge. We do not understand that the fact of making a note payable at a particular place amounts to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, and that the money so deposited is at the risk of the holder of the note. It is a mere designation of the place where the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note, the money was to be paid by the makers to the payee, not to (and it might have added by) Conrad, but at Conrad's banking-house. . . . If this be so, if the holders of this note were under no obligation to present this note at Conrad's counter, does the fact that it was presented change the liability of the party in any way? . . . Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check, or draft of the maker and depositor."

The principle of that case is reaffirmed in *Ridgely Bank v. Patton*, 109 Ill. 479.

In *Scott v. Shirk*, 60 Ind. 160, the court say: "A bank of deposit has no power to apply a money deposit in its possession belonging to the maker of a promissory note, payable at such bank, to the satisfaction of such note, without his consent."

To the same effect is *Exchange Bank v. Bank of North America*, 132 Mass. 151, where the court say: "The case expressly finds that Carnick, Calvert, & Co. never had given any authority to the plaintiff to pay their notes out of their funds on deposit. Such authority cannot be implied merely from the fact that they made their notes payable there"; citing in support of this proposition *Wood v. Merchants' Savings Co.*, 41 Ill. 267, above. This was as late as 1882, from a state of the highest authority on questions of commercial law.

The case of *Gordon v. Muchler*, 34 La. Ann. 604, is said to have settled for the state of Louisiana this question in the same manner. But we have been unable to examine this volume, it being misplaced from our state library.

The supreme court of Missouri, as reported in the text-books, seems strongly to intimate a similar holding. In *Bank v. Carsons*, 32 Mo. 191, the court is quoted as saying: "The bank is not bound to apply the deposits, if it has even the authority to do so."

The text-books generally, which are cited as sustaining the defendant's contention, agree that it is not the duty (but merely a privilege that may or may not be exercised by the bank) of the bank to so apply deposits of the maker.

Surely this will not do to leave the action of the bank, upon which so many important, not to say intricate, rights of other parties depend, open to the uncertainty that must follow its optional exercise by the bank. We quite agree with Mr. Daniel, in his work on Negotiable Instruments (vol. 1, sec. 326 b), that the question should be settled definitely, and not left to the option of the bank.

But we think it much sounder and safer to hold that, in the absence of instructions, either expressed or to be implied from previous course of dealings between the maker and the banker, the bank has no authority to apply the funds of its depositors to the payment to third parties of notes payable at its bank.

We limit this decision to a payment made to a third party, because we are not called upon to decide any but the case before us, which, as we have seen, is one of a payment to a third party.

The right of the bank to retain out of deposits sufficient to pay itself, where the bank is the holder and owner of the note, is quite a different question, involving an application of the law of set-off, and is not intended to be affected by anything said in this opinion.

We close the citation of authority which is in accord with our conclusion by a reference to 1 Edwards on Bills and Notes, 3d ed., 1882, p. *166, sec. 195, where the learned author says: "The better opinion undoubtedly is, that the bank has no right to pay out the money of a depositor except upon his order, or with his assent"; citing approvingly *Wood v. Merchants' Savings Co*, 41 Ill. 267, and *Scott v. Shirk*, 60 Ind. 160, above referred to.

See also Newmark on Bank Deposits (1888), sec. 119, p. 120, where, in the text, it is said: "A banker has no right to apply money on deposit in his bank to the payment of a note of the depositor, payable at the bank, without the order of the depositor"; citing the case already referred to by us of *Ridgely National Bank v. Patton*, 109 Ill. 479.

If we consulted our own convenience and the necessities of the case, we would end this opinion here. But it has been so strenuously urged at the bar that the great weight of authority is the other way, that it becomes proper, if not necessary, to refer to the authorities upon which such claim is predicated.

We have laboriously and at length examined everything that has been available to us that presents the other side; but owing to the length to which a review of cases ordinarily leads, we will try to be brief in what we have to say in relation thereto.

It is true that Bolles on Banks and their Depositors (sec. 403), and Morse in his work on Banks and Banking (vol. 2, sec. 557), and Pratt in his Manual of Banking Law (c. 10, p. 44), after stating that there are authorities both ways, say the weight of authority is, that it is the privilege of the bank (to be exercised or not as it may see proper) to apply deposits to the payment of a note of the depositor payable at its bank.

The American cases cited by these text-writers are the same, and consist in the main of the following: *Mandeville v. Union Bank*, 9 Cranch, 9; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Indig v. National City Bank*, 80 N. Y. 106; *Commercial National Bank v. Henninger*, 105 Pa. St. 496, and a few other cases where the bank was itself the holder of the note.

The states represented are not so numerous, as appears from their citations, as those who hold as we do, while the cases themselves will not stand close scrutiny.

Great prominence is given the case of *Mandeville v. Union Bank of Georgetown*, from the supreme court of the United States, reported in 9 Cranch, 9. All the text-books quote the following language from the opinion in this case, pronounced by Chief Justice Marshall: "By making a note negotiable in bank, the maker authorizes the bank to advance, on his credit, to the owner of the note the sum expressed on its face," and announce the doctrine as contended for. The few cases in the same direction build with equal confidence upon this decision. It must be admitted that, when taken by itself, the language quoted does seem to sustain them. But when we examine the facts in that case, it becomes manifest at a glance that the point really decided, and to which the language was intended to apply, is as foreign to the question we are considering as it could well be, and does not relate at all to commercial paper.

The facts of the case were briefly these: Mandeville, a citizen of Virginia, executed his note to one Nourse for \$410.50, sixty days after date, negotiable at the Union Bank of Georgetown, payable at the Bank of Potomac, in Alexandria. On the day of its execution, the note was negotiated and discounted by the Union Bank of Georgetown, and the proceeds thereof paid over to Nourse. After this, Nourse, becoming indebted to Mandeville, executed to him his note, due in sixty days, "negotiable at the Bank of Alexandria, payable at the Bank of Columbia."

When the note given by Mandeville, and discounted by the Union Bank, fell due, it was not paid, and the Union Bank sued Mandeville thereon. He defended, trying to set off against the note the debt he held against Nourse. It was insisted for Mandeville that his rights must be determined according to the laws of Virginia, the *lex loci contractus*, and that under the laws of that state a defendant is allowed to set off against the assignee of a promissory note any just claims which he had against the original payee before notice of the assignment of the note.

For the bank, it was said that it was immaterial by which law the note was to be governed, for it was made with a view, expressed on its face, to be discounted by the Union Bank, whereby the defendant had waived any offset to which he might otherwise have been entitled. The court in deciding the question said,—and we give the opinion entire *in hæc verba*: "It is entirely immaterial whether this question be governed by the laws of Virginia or of Maryland. By neither of them can the discounts claimed by the plaintiff in error be allowed. By making a note *negotiable* in bank [the Italics are ours], the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face. It would be a fraud on the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up. The judgment is to be affirmed, with damages at the rate of six per cent per annum."

Thus we see that no possible question arose upon that part of the note making it payable at the Bank of Potomac, nor with that bank, but upon that part of the note making it negotiable at the Union Bank, and with the latter bank, and no question of the application of bank deposits in any shape is presented. The only matter considered, or that could possi-

bly have been considered, by the court was, whether a party having authorizing a bank to discount his note could thereafter set off debts he held against the payee of the note. The facts of this case were not published in the earlier Cranch reports, which doubtless accounts for the misconception of the opinion by the usually accurate and always learned text-writers, who have made it the groundwork of the effort to establish the rule as contended for by defendants in the case at bar. The facts will be found in the Lawyers' Co-operative Publishing Company's edition of the United States Supreme Court Reports.

The case of *Commercial National Bank v. Henninger*, 105 Pa. St. 496, is greatly relied on by the text-books above referred to. There the bank was the holder and owner of the note, and the maker was B. F. Young, its cashier. At the close of business on the day of the maturity of the note there were funds of the cashier on deposit sufficient to pay it.

The cashier, instead of charging up said note against his deposit, handed it to a notary for protest, the object being to hold the indorser, and compel him to proceed against the maker in order to let in a defense which the maker could not set up against the bank. The suit was by the bank against the indorser, who claimed to be discharged by the facts stated. The court, among other things, say: "Where the depositor becomes indebted to the bank on one or more accounts, and such debts are due and payable, the bank has the right to apply any deposit he may have to their payment,—this, by virtue of the right of set-off. Where a general deposit is made by one already indebted to the bank, the latter may appropriate such deposit to the payment of such indebtedness."

And while admitting that the bank might waive this right of set-off, so far as it was concerned, yet where the rights of other parties were concerned, the waiver may result in releasing sureties; the court illustrating the ground of the decision in the following language: "If I am the holder of A's note, indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested, and hold C as indorser? It is true, A's note is not, technically, paid, but the right to set off exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this be so between individuals, why is it not so between a bank and an individual?"

How far removed this case is from supporting the doctrine as contended for here is too manifest to justify elaboration, yet it is cited in the text-books as sustaining the assertion that the weight of authority is in favor of the right of a bank, without regard to whether it is or not the holder of the note, to appropriate deposits of maker to its payment upon the idea that a note made payable at the bank is tantamount to a check on the bank.

Let us see next what is in the case of *Indig v. National City Bank*, 80 N. Y. 100. Plaintiff held a note payable at the Bank of Lewville. He deposited it with the defendant bank for collection, who sent it by mail to the Bank of Lewville. On maturity, the Bank of Lewville charged the note up to the maker, he having funds there on deposit, and forwarded its draft to defendant. The Bank of Lewville failed before the draft was cashed. The plaintiff sued the defendant for the amount of the note, which amount he alleged was lost through defendant's negligence. It was insisted for the plaintiff that defendant by sending the note to the Bank of Lewville constituted that bank its agent for the collection of it, and "therefore liable for the proceeds, as having been received by the Bank of Lewville, the last-named bank being deemed to have received the proceeds by charging the amount of the note against its customer, the maker." The court, in response, say: "We do not think that any such agency was created. The note, *in so far as relates to its presentment at the bank*, and the duties of the bank in respect to it, was equivalent to a check drawn by the maker upon the bank where the note was made payable"; citing *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 88; 7 Am. Rep. 314.

We will first observe that the portion of the opinion which we have taken the liberty of italicizing is directly in conflict with the decisions in our own state with reference to the duties of the holder of a note so payable as to the non-necessity of presentment, etc., and overlooks and confuses the distinctions we have already pointed out between a check and a note as to presentment.

The right of the Bank of Lewville to pay the note because made payable at its place of business was not the issue in that cause, but in the argument upon the non-liability of the defendant the court merely assumed, upon the authority of the *Ætna Bank* case, in 46 N. Y., that such was not the law. So that, for the soundness of the doctrine, we must turn to the 46

N. Y. case. When we read the *syllabus* we are told that it simply decides that a direction of a bank depositor to his bank to pay out his funds on his notes due and to become due in a certain order creates no trust in favor of the holders of such notes, and that they have no right of action against the bank for its failure to comply with the depositor's instructions. The facts were, that the Florence Mills, a Connecticut corporation, had made two notes, payable at the counter of the defendant; one fell due April 2d and the other April 4th. The note falling due on the 2d of April was presented for payment, and protested for non-payment. On the 3d of April the Mills company sent a letter to the bank containing a draft (which, with a small balance to the credit of the mills, was sufficient to pay either note, both being for the same amount), with directions to credit their account with the draft, and then to pay their note falling due on the 4th. The draft was collected on the 3d, the day it was received, and on the same day the bank paid the note that had been protested on the 2d. The note due on the 4th not being paid, the holder sued the defendant, insisting that the letter directing how the proceeds of the draft should be applied operated as an equitable assignment or appropriation of the proceeds to the payment of its note falling due on the 4th.

This alone was the issue, and such was the reporter's understanding of it, as shown by the *syllabus*. The opinion takes a much wider range, and does announce the doctrine as broadly as here contended for, that a note payable at a particular bank is in substance a check.

But that part of the opinion making the announcement is without any citation of authority or process of reasoning to sustain it, and it is difficult to understand exactly upon what the court predicated its opinion that the note was the equivalent to a check. In two paragraphs it seems to be placed upon the agreement or understanding of the parties, and in another, upon commercial usage, while in another it seems to be predicated upon the legal effect of the note so written. Nor does it appear that the defendant bank was not itself the owner of the past due note to which the deposit was applied, in violation of the instructions of the depositor.

Moreover, the opinion was by a divided court, Chief Justice Church dissenting. So that our answer to this case, which is much relied on by the defense here, is, that what is said concerning the question now before us was incidental merely.

unsupported by reason or authority, and with an ambiguity of statement of facts, so far as this question is concerned. And we may be permitted to add that on the very point decided it is of most questionable soundness. It virtually holds that a customer of a bank cannot make a deposit with instructions accompanying the same to apply proceeds to a note of the depositor maturing on the succeeding day that would prevent the bank from applying the proceeds to a note past due before the deposit was made. It seems not only to create a new law for banks, but it strikes down the well-established right of a debtor unable to pay two debts to direct and control the application of his payments to the one he may prefer.

The authority of such a decision, viewed from any standpoint, is not sufficient to overturn our convictions, nor break the force of the well-considered cases holding to the contrary.

In *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58, Judge Cooley says: "It cannot be pretended that the making a note payable at a particular bank can make the bank the agent of the payee to receive payment"; and we ask: Would this not be just as fair and reasonable reading of the terms as it is to construe them to make the bank the agent of the payor to make payment? They would serve the one purpose as well as the other; and there is as much authority for the one holding as the other; and several of the cases cited as sustainign the defendant's contention here do go to the very point of deciding what Judge Cooley says is not law. Such is the decision in *Lazier v. Horan*, 55 Iowa, 75, 39 Am. Rep. 167, already herein referred to.

It is true that Mr. Daniel, in the third edition (vol. 1, sec. 326 a) of his valuable work on negotiable instruments, says that in his previous editions he had taken a different view, but that he is now of opinion that he was wrong, and that "upon principle and authority we should say that a banker at whose place of business negotiable paper is made payable may apply to its payment funds of the maker on deposit, at its maturity, the relations of banker and customer and the terms of the instrument justifying the inference that the customer intended this to be done"; citing in note the case of *Indig v. Nat. City Bank*, 80 N. Y. 106; and adds in the text: "And other well-considered cases sustain this view,"—referring to *Lazier v. Horan*, *Thatcher v. Bank*, *Ætna Nat. Bank v. Fourth Nat. Bank*, and the case of *Home Nat. Bank v. Newton*, already so freely quoted from by us. While we entertain for

this distinguished author the highest respect for his learning and accuracy (and the writer especially esteeming him no less highly personally than professionally), we are constrained to believe that the view expressed in the previous editions of his work is sounder and more in keeping with authority and reason, and the necessities of the large interests concerned, than is found in the last. There is no new light shed on this subject that in our opinion justifies the change of view.

This author seems to consider separately the rule as applied to acceptances and to notes, and as to acceptances he says: "It may be regarded as well-settled law in England that an acceptance payable at a particular banker's is tantamount to an order on the banker to pay same to the person who, according to the law merchant, is capable of giving a good discharge to the bill." In support of this he cites in note 3 to section 326 a, *Robarts v. Tucker*, 16 Ad. & E., N. S., 578; *Kymer v. Laurie*, 18 L. J. Q. B. 218; *Forster v. Clements*, 2 Camp. 17; and in addition thereto, Thompson, Chitty, Parsons, Byles, and Edwards on Bills.

Of the text-books cited, Edwards, as we have already seen, takes a different view, while the others refer to the same cases that Mr. Daniel does, as far as they were extant at the time of publication, their text adding nothing thereto germane to the point under discussion.

Having already extended this opinion beyond what is deemed necessary by the writer, we will undertake to go into but one of the English cases referred to, although they have all been considered. *Robarts v. Tucker*, 16 Ad. & E., N. S., 578, was where the banker paid an acceptance of the Pelican Life Insurance Company, payable at such banker's, upon a forged indorsement. This payment was debited to the company on its pass-book, and returned to it by the banker, and the company credited its banker on its books.

Subsequently the company was compelled to pay the amount thereof to the true owner of the acceptance, and thereupon brought this suit against the banker.

The first count in plaintiff's declaration alleged that, in consideration of certain money loaned by it to the defendant banker, and of the agreement to retain and employ the defendant as the banker of plaintiff, the defendant undertook, and promised the company, to the extent of money so lent, to pay to the lawful holders thereof all such bills of exchange as should be accepted by the company, payable at the banker's

house, and that not regarding, etc., the defendant had charged plaintiff with an acceptance that had been paid to persons not legally authorized to receive payment and give an acquittance, etc.

The second count was for money loaned, account stated, etc.

The contest was, whether the course of dealing between the bank and its customer, creating the obligation of the banker to pay his customer's acceptances made payable at the place of business of the banker, rendered the latter liable if he paid same upon a forged indorsement, it being conceded that the act of acceptance was a guaranty of the genuineness of the drawer's signature.

The court decided that the banker's authority to pay was limited to the payment of genuine indorsements. The court adding that "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honor them by giving a check upon the banker."

And it was in this connection that Parke, B., used the language that has been made the basis of the announcement by the text-writers of the doctrine contended for, the latter losing sight of, as we think, the custom and course of dealing, if not an express agreement, that, by reason of the deposit or lending of the funds to the banker, the latter undertook to protect the credit of the customer, under which, if he failed to do so, the banker became liable to an action by his customer for permitting him to be dishonored: See *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Whitaker v. Bank of England*, 1 Crompt. M. & R. 744.

Recognizing the mutuality of the obligation, it was said by Maule, J., in *Robarts v. Tucker*, *supra*, that "it is a hardship on the banker, if he must either pay the bill at once, at the peril of an indorsement proving a forgery, or dishonor the bill, at the risk of an action against him by his customer."

Forster v. Clements, 2 Camp. 17, cited by Mr. Daniel and other text-writers, was a case presenting for adjudication the same question presented in *Robarts v. Tucker*, *supra*, differing from it only in the fact that in *Forster v. Clements*, *supra*, the banker had paid the acceptance without funds, and then sued the acceptor, its customer. The acceptor defended upon the ground that the bank had not proven the genuineness of the first indorser's signature.

If we are to ingraft upon the law of this state what is said to be the English rule, authorizing the bank to treat the paper made payable at its place of business as tantamount to a check, we should do so not in part, as the few American cases relied on do, but as a whole, and carry with it an obligation and duty upon the bank to pay, so that upon a failure to do so it must be liable to an action for damages for injury to the credit of its customer. Well might the banks pray to be delivered from their friends if the rule contended for is to be established in this state with all its attendant uncertainties and dangerous liabilities.

Without referring further to the cases cited in the text-books, they may be classed as resting either on custom well established or course of dealing between the parties thereto, or to paper owned and held by the bank at maturity, where the principle of set-off has been applied.

Without further discussion, we hold on this branch of the case the decree of the chancellor was erroneous, and should be reversed.

Of course it is needless to add that there is nothing to prevent any depositor from making such agreement with his bank as to the protection of his paper. We merely hold that, in the absence of an understanding, the bank pays at its peril.

One other question remains to be disposed of. For the defendant it is urged that if it be held that the bank had no authority to pay the note, then they ask to be permitted to rely upon such payment as a set-off against complainant's demand, and the note is filed with the answer, showing the indorsements as given in the opening statement of this opinion. The answer is asked to be taken as a cross-bill, but no process is issued.

Without determining whether this matter could or could not be made in answer merely without cross-bill, it is sufficient to say that in whatever form presented, it would be unavailing to the defendant under the proof in this case, which shows that by reason of such unauthorized payment, and the failure of the bank to notify the complainant thereof, the latter had a settlement with J. D. Carter & Co., the parties primarily liable, as between themselves and complainant, subsequent to such payment, and in ignorance thereof, wherein complainant allowed Carter & Co. credit for the amount of said note, upon the assumption that they had, in accordance

with their contract, paid the same. In consequence of all of which, together with the subsequent insolvency and removal from the state of Carter & Co., before any knowledge that his deposits had been applied, the complainant has lost recourse over on parties primarily liable thereon. So that to allow the set-off would be to cast upon complainant the loss resulting from the unauthorized act of the defendant.

Under the facts of this case, the complainant's equity is superior to any right of set-off which the defendant might otherwise have had.

Let the decree be reversed, and judgment here for the complainant, with interest and costs.

BANKS AND BANKING. — The relation between the depositor and the bank is simply that of debtor and creditor: *Fowler v. Bowery etc. Bank*, 113 N. Y. 450; *ante*, p. 479, and note; *Gumbell v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426; *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249, and note; *Lynch v. First Nat. Bank*, 107 N. Y. 579; 1 Am. St. Rep. 803. Money deposited in a bank in the ordinary course of business is money loaned to the bank, with the superadded obligation that it is to be paid when demanded by check: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146, and note 157; *Fogarties v. State Bank*, 12 Rich. 513; 78 Am. Dec. 468.

CUSTOM AND USAGE: See note to *Mutual Ass'n etc. v. Scottish etc. Ins. Co.*, *post*, p. 826.

BANKS AND BANKING. — The direction by a depositor to apply deposits to the payment of checks or drafts or notes in a particular order creates no trust in favor of the holders; and a failure to comply with the direction is a breach of contract for which the depositor alone can sue: *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314.

ROBINSON v. QUEEN.

[87 TENNESSEE, 445.]

CONTRACTS. — VALIDITY AND OBLIGATION OF CONTRACT, and capacity of parties thereto, are to be determined by the *lex loci contractus*, unless there be something in the contract which is deemed hurtful to the good morals or injurious to the rights of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country.

CONTRACTS. — COMITY, OR RULES OF PRIVATE INTERNATIONAL LAW, only require the recognition and enforcement of the law of the place of contract, leaving the state called upon to enforce such law the use of its own forms and machinery, so far as they can be adapted to the end in view.

MARRIED WOMEN — LIABILITY ON NOTE EXECUTED IN ANOTHER STATE. — Note of married woman, executed by her and made payable in another state where she and the payee are both domiciled, and under whose

laws she is clothed with all the powers of *feme sole*, so far as the right to contract and to sue and be sued are concerned, is valid in Tennessee, and she is liable thereon in the courts of such state, notwithstanding the existing disabilities of coverture.

MARRIED WOMEN — CONVEYANCE OF SEPARATE ESTATE BY. — Under Tennessee statute (Act of 1869-70, c. 99), a married woman owning a separate estate, without restriction upon her power of disposition, may convey such estate without her husband joining in the deed, provided she has a privy examination before a chancellor or circuit judge of the state, or clerk of the county court, as required by the statute.

Leland Jordan, J. A. Jones, and E. F. Smithson, for the appellants.

John E. Richardson, for the respondent.

FOLKES, J. The first question to be disposed of in this cause is, whether a married woman, domiciled in the state of Kentucky, is liable in the courts of this state upon a note made by a firm of which her husband was a member, and executed by her as surety for such firm, where, under the laws of Kentucky, she had, before the execution of the note, been emancipated from all the disabilities of coverture, and clothed with all the powers of a *feme sole*, so far as the right to contract and to sue and be sued were concerned. This inquiry we answer in the affirmative.

Though some authorities may be found to the contrary, it may now be said to be well-settled law that the validity of a contract, the obligation thereof, and capacity of the parties thereto, is to be determined by the *lex loci contractus* (in the sense of the place of performance), unless there be something in the contract which is deemed hurtful to the good morals or injurious to the rights of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country.

The notes involved in this suit were made in Kentucky, payable there, the makers and payees resident there, and, as we have already stated, were valid there, and binding and enforceable against the married woman as fully as if she were a *feme sole*. See General Statutes of Kentucky, article 4, section 1, and article 2, sections 6 and 7, where authority is given the circuit courts of that state to pass judgment of emancipation upon married women under certain circumstances therein set forth. A certified copy of such proceedings is exhibited in this record, showing compliance with the statute on the part of Mrs. Queen.

Under these facts, what are the powers and what is the duty of the courts of this state when, by reason of the fact that the defendant has property in this state, we are called upon to enforce, as against the married woman, the collection of the amount due on the notes in question?

The general rule as to the enforcement by one state of a contract valid in the state where made and to be performed is not denied by the counsel for the defendant; but it is insisted that inasmuch as a note made by a married woman is void under the laws of this state, and inasmuch as it is the fixed policy of this state to throw around married women the shield of disability, we should not, under any supposed obligation of comity, entertain a suit predicated upon such a contract.

If this were a suit against a married woman, a citizen of this state, on a contract made out of the state, there would be much force in the insistence of the defendant. But here the law of the domicile is the same as the law of the contract, and we merely encounter a conflict between the law of the contract and the law of the forum.

In such case, especially where the foreign law concerns the capacity of parties to contract, as affected by the disabilities of infancy and coverture, the *lex loci contractus* is to govern: Story on Conflict of Laws, secs. 103, 241. And although Chancellor Kent, in the early edition of his Commentaries, seemed inclined to favor the contrary doctrine of the civilians, yet in the notes afterward added he unequivocally concurs in the conclusions of Mr. Justice Story: 2 Kent's Com. 233, notes 458, 459, and note; see also Wharton's Conflict of Laws, sec. 96.

See also a very elaborate consideration of the authorities in the able opinion of Gray, C. J., in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, which, while it fully sustains our position here upon principle and authority, goes much further than we are called upon to do in this case. That being a case where the married woman, domiciled in the state of Massachusetts, where such a contract was void, made a note in Maine, by letter, and such a contract, being valid in Maine, was enforced by the court in Massachusetts. It is valuable for its research and ability in the discussion of the question underlying the one now before us, and for this reason is referred to, without intending to approve or dissent from the point to which the discussion there goes.

Our own state has more than once recognized and enforced the principle which is controlling in this case: *Elliott Nat. Bank v. Railroad*, 2 Lea, 676; *Bank of Columbia v. Walker*, 14 Id. 299, 306; *Talmadge v. N. O. C. & T. Co.*, 3 Head, 337, 341, 342; *Pearl v. Hansborough*, 9 Humph. 426, 433, 436; see also *Knowlton v. Erie R'y Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *Scudder v. Bank*, 91 U. S. 406.

The case of *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319, does not stand in the way of the conclusion we have reached, although some of its argument may seem to do so. There the obligation of the married woman was dependent upon a charter of a Louisiana corporation authorized to lend money to the "agricultural interest on notes and mortgages," and to make such contracts with married women, and to enforce the same against their property. It was held that the act in question contemplated the emancipation of the wife so far, and so far only, as to capacitate her to join with her husband in the "hypothecatory obligation." And while she thus subjected all her property dotal as well as that embraced in the mortgage, it was not intended nor supposed that the obligation of the wife extended further than to cover her dotal and paraphernal rights and property in that state. As is said by the learned judge rendering the opinion in that case: "The transaction stands upon ground local to Louisiana, and a policy there which is exceptional from the general rule and general law. Assuming, as a doctrine of the law, that the contract of a married woman valid at the place where made shall be so regarded everywhere, does that embrace an obligation incurred by her, growing out of special circumstances, and not included in the general law and policy of the place, but resting altogether on special reasons and looking to local property for its payment?" And continuing, it is said: "If, by the law of Louisiana, a married woman was competent to incur debts generally, and coverture imposed no disability, it would be a different question from that we are dealing with." The case at bar presents exactly that "different question." Here, as we have seen, under the proceedings in Kentucky, the disability of coverture was absolutely removed, and the married woman was authorized to contract debts generally.

It must be noticed, also, that in *Bank v. Williams*, *supra*, the married woman was a resident of Mississippi at the time she made the Louisiana contract and at the time she was sued, which presents a very different phase of the question

under consideration. Nor is there anything in *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 334, in any manner antagonistic. It merely holds that "where a contract of an equitable character is made in another state in which there is no distinction between courts of law and equity, it can still be enforced in Illinois only in a court of equity." It recognizes fully the doctrine that a contract of a married woman valid where made will be held valid in another state, but decided that in enforcing such contract regard must be had to the forms of pleading in force in the state where the remedy is sought. In other words, the *lex fori* determines the nature of the remedy as to parties, forms, etc. Under this rule we act in requiring the husband to be a party defendant with the wife, as was done in the case at bar. While under the law of Kentucky this married woman has had her disabilities removed, and can contract, sue, and be sued as a *feme sole*, we recognize and enforce in this state so much of the foreign law as determines and fixes her liability; in other words, the law of the contract; but in enforcing such liability in the courts of this state, if she is plaintiff, she must sue by next friend or with her husband; and as defendant, her husband must be joined with her as a party.

Comity, as it is sometimes called, but more properly the rules of private international law, go no further than to require the recognition and enforcement of the law of the place of the contract, leaving to the state called upon to enforce such law the use of its own forms and machinery, as far as the same can be adapted to the end in view.

Without pursuing this branch of the case further, the court is of opinion that the decree of the chancellor dismissing the bill upon the ground that no judgment could be rendered against the married woman on the note is erroneous, and should be reversed, and decree here made in favor of complainants for the full amount of the notes, with interest and costs.

This brings us to the consideration of the second question presented in this record.

The bill herein not only attaches certain property of the married woman upon the statutory grounds, but seeks to set aside as fraudulent a conveyance made by the married woman to her brother and co-defendant, I. D. Miller, alleging that the conveyance was made to hinder, delay, and defeat complainants in the collection of their debt.

Much proof is taken *pro* and *con* as to the *bona fides* of the sale and conveyance to her brother. With the burden of proof on complainants, and the positive testimony of the parties defendant, we are unable to discover anything more for the complainants than suspicions predicated upon the relation of the parties, the apparent inadequacy of price, and the coincidence of the conveyance with the maturity of a part of complainant's debt, and the embarrassed situation of the husband at the time,—all of which may be said to be sufficiently met and overcome by the defendant's proof, so far as the bill seeks to set aside for fraud the sale of the storehouse and lot in Murfreesboro to I. D. Miller.

But it is charged in the bill that if such sale to the brother be not void as made in fraud of creditors, it is void and of no effect by reason of the fact that it was executed by Mrs. Queen without her husband joining with her, and without privy examination. The record shows that the bill was filed on December 22, 1886. On the 21st of December the deed in question was registered. It was dated on the 18th of December, and on the same day acknowledged by Mrs. Queen before a notary public in Kentucky. It was not signed by her husband, and her acknowledgment is in the form prescribed by our statute for persons *sui juris*.

If such acknowledgment without privy examination is void, then the property having been attached in this cause as the property of Mrs. Queen is liable to be subjected to the satisfaction of the decree to be rendered against her. Is it void?

The *status* of this married woman under the proceedings in Kentucky, whereby she was emancipated from the disabilities of coverture, however much recognized and enforced in this state, as to the validity of her contracts made in that state, cannot dispense with or in any manner effect our own laws with reference to the conveyance of real estate situated here, nor the prerequisites for registration of deeds as against creditors. So that we must look to the laws of our own state alone as determining the sufficiency of the acknowledgment of this deed.

There had been an antenuptial contract made between Mrs. Queen and her then contemplated and now husband, which was duly acknowledged and registered in Rutherford County, whereby the house and lot in question, as well as other property, was settled to her sole and separate use. It is insisted by her counsel that, as the owner of a separate es-

tate, she has the power to dispose of her realty by a deed without privy examination, under the authority of *Sherman v. Turpin*, 7 Cold. 382, and under the provisions of section 3350 of Milliken and Ventrees's Code.

In *Sherman v. Turpin*, *supra*, it was held that privy examination is not necessary, and that the husband need not join in the deed conveying the wife's separate estate, where the instrument creating the estate gives her all the powers of a *feme sole*. The language of the instrument in that case, as appears from the opinion, was as follows: "With power, at her pleasure, to sell, convey, devise, or otherwise dispose of the same, in and when she may see proper, as fully as if she were a *feme sole*."

The marriage contract in the case at bar does not, in terms, give her the right to convey as a *feme sole*, the strongest language used in this respect being: "To her sole and separate use, free from debts, etc., of husband, with power to said Mary S. to use and dispose of the same as she may think proper, both the realty and the rents and income upon it, and the personalty, and the interest and income from it, and also with power to the said Mary S. to change the realty into personalty, or the personalty into realty, when and so often as she may think proper." So that the case is not controlled by *Sherman v. Turpin*, *supra*, which is decided upon the particular language of the conveyance creating the estate, which, in terms, gave the right of disposition as fully as if she were a *feme sole*.

Nor can this deed be sustained under the third section of the act of 1869-70, carried into the code (Milliken and Ventrees), section 3350, for if she would, under an instrument creating a separate estate, where the power of disposition is not withheld, have the power to convey without her husband joining with her, such conveyance would not be valid, unless her privy examination takes place before a chancellor or circuit judge of this state, or clerk of the county court, as provided in the second section of said act, carried into the compilation of Milliken and Ventrees at section 3347.

This deed, as we have seen, being acknowledged by the married woman before a notary in Kentucky, is, therefore, ineffectual to divest her of her title to the property therein described, and the same was subject to the attachment in this cause.

The majority of the court is of opinion and decides that

under the act of 1869-70 a married woman owning a separate estate, where there is no restriction upon her power, is authorized to convey such estate without her husband joining in the deed, where she has a privy examination before a chancellor or circuit judge of this state, or clerk of the county court. Not deeming it necessary to decide this question, and not being able to agree with the majority, I would have preferred not considering here the effect of this act in the matter referred to. The majority, however, think it important that the question should be settled, and that it fairly arises in this case in such manner as to justify its settlement. I content myself with saying that it may be admitted that the language of the act is sufficient to justify such construction of it; but that this, like all other acts of the legislature, should be construed with reference to the evil intended to be cured, and that by so doing we are enabled to arrive at the intention of the legislature, which is, after all, the cardinal rule of interpretation. Applying this rule, I am unable to resist the conclusion that the act in question, so far as it relates to separate estates, was intended to put at rest the vexed questions as to the powers of sale, etc., possessed by married women over their separate estates, which a series of decisions in this state had rendered troublesome, beginning with *Morgan v. Elam*, 4 Yerg. 375, and on down to *Young v. Young*, 7 Cold. 461. The subject of her powers might well be settled without disturbing the form of her conveyance. And that in view of the jealousy with which our legislation, and that of our mother state of North Carolina, since the act of 1715, has watched over and provided for the joint execution of deeds by husband and wife, we should not infer that the legislature intended, in the act in question, to deprive a married woman of the protection from extraneous influence and ill-advised action which the husband's presence would be likely to secure to her.

Without elaboration, I feel constrained to dissent from the holding of the majority of my brothers on the effect of the act in question.

This difference, however, does not affect the result already reached in this cause.

The decree of the chancellor will be reversed, and judgment here for the amount of the notes, with interest and costs, and unless paid within the time to be fixed in the decree, the property attached, including the house and lot, will be sold to satisfy the judgment.

CONTRACTS, CONSTRUCTION AND ENFORCEMENT OF. — The *lex fori* governs as to the proof of the contract; but the *lex loci contractus* governs as to the obligations of the contract: *Downer v. Cheesebrough*, 36 Conn. 39; 4 Am. Rep. 29; *Succession of Wilder*, 22 La. Ann. 219; 2 Am. Rep. 721; *Ivey v. Lalland*, 42 Miss. 444; 2 Am. Rep. 606; *Carson v. Hunter*, 46 Mo. 467; 2 Am. Rep. 529; *Knowlton v. Erie R'y Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *Dyke v. Erie R'y Co.*, 45 N. Y. 113; 6 Am. Rep. 43; *Jordan v. Thornton*, 7 Ark. 224; 44 Am. Dec. 546; *Lane v. Levillian*, 4 Ark. 76; 37 Am. Dec. 769; *Baxter v. Willey*, 9 Vt. 276; 31 Am. Dec. 623; *Buckner v. Watt*, 19 La. 216; 36 Am. Dec. 671; *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568; *Allshouse v. Ramsay*, 6 Whart. 331; 37 Am. Dec. 417; *Hale v. New Jersey S. N. Co.*, 15 Conn. 539; 39 Am. Dec. 398; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *Touro v. Cassin*, 1 Nott & McC. 173; 9 Am. Dec. 680; *King v. Harman*, 6 La. 607; 26 Am. Dec. 485; *Scoville v. Canfield*, 14 Johns. 338; 7 Am. Dec. 467; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410; *Warder v. Arell*, 2 Wash. 282; 1 Am. Dec. 488; *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279; *Thompson v. Ketcham*, 8 Johns. 190; 5 Am. Dec. 332; *De Lobry v. De Laistre*, 2 Harr. & J. 191; 3 Am. Dec. 535; *Bradshaw v. Newman*, 1 Ill. 133; 12 Am. Dec. 149; *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183; *Miles v. Oden*, 8 Martin, N. S., 214; 19 Am. Dec. 177; *Halley v. Halley*, Litt. Sel. Cas. 505; 12 Am. Dec. 342; *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Ayer v. Tilden*, 15 Gray, 178; 77 Am. Dec. 355; *Galliano v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643; *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525; *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227; *Donald v. Hewitt*, 33 Ala. 534; 73 Am. Dec. 431; *Spears v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206. A contract which is valid in the state where it is made is enforceable in another state, unless it is clearly contrary to good morals, or repugnant to the policy or positive institutions of that state: *Phinney v. Baldwin*, 16 Ill. 108; 61 Am. Dec. 62; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Stricker v. Tinkham*, 35 Ga. 176; *Galliano v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643; *Thureston v. Rosenfeld*, 42 Mo. 474; 97 Am. Dec. 351; *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475; *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525.

MARRIED WOMEN — CONFLICT OF LAWS. — Where a promissory note was executed in New York by a husband and wife for a debt of the husband, and expressly charged the wife's separate estate, under the laws of New York the wife's liability on such a note being purely equitable, and in said state both legal and equitable remedies being administered by and in the same court, in an action on said note against both husband and wife in Illinois, where legal and equitable remedies are administered by different tribunals, the liability of the husband was at law, while that of the wife was at equity, and a joint judgment against both at law was void: *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334; and to the same effect substantially is *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319.

PEPPER v. TELEGRAPH COMPANY.

[87 TENNESSEE, 554.]

TELEGRAPHS — NEGLIGENT TRANSMISSION OF MESSAGE — MEASURE OF DAMAGES. — A telegram which is expressed in abbreviations known to the transmitting company is in no sense "in cipher"; and if such abbreviated telegram be altered through the negligence of the company, the sender will be entitled to recover such damages as result naturally and proximately from the company's default, and which he could not himself avert, acting in good faith, and in the exercise of ordinary prudence. And the burden of proof is upon the negligent company to show that the loss might have been mitigated by a different course of conduct which a reasonably prudent man ought to have taken.

TELEGRAPHS. — MERE FACT OF EMPLOYMENT OF TELEGRAPH COMPANY TO TRANSMIT MESSAGE does not make the company the agent of the sender so as to bind him upon a telegram negligently altered in the transmission. The sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent.

TELEGRAPH COMPANY CANNOT, BY ANY CONTRACT NOT FAIR, just, and reasonable, if at all, limit its liability for damages caused by its negligence in the transmission of messages.

TELEGRAPHS — SALE DEFEATED BY NEGLIGENT ALTERATION OF MESSAGE — BASIS OF LIABILITY. — Where a sale is effected by telegram, and the goods are delivered, but it is afterwards discovered that the sale is invalid owing to the negligent alteration by the telegraph company of the seller's message reducing the price, the true measure of damages is the difference between the real value of the goods and the price which the seller, in the exercise of due care and diligence, should, under the circumstances of the particular case, have received. But the difference between the prices named in the telegram as sent and as received may be taken as the correct measure of damages, in the absence of proof showing any better or more equitable basis of the company's liability.

Craft and Craft, for the complainants.

Turley and Wright, for the respondent.

FOLKES, J. This is a suit by complainants to recover damages for a breach of a contract to deliver correctly a certain telegram intrusted to defendant as the owner and operator of a telegraph line.

The facts necessary to a correct understanding of the case are as follows: On October 5, 1886, R. F. Bugg & Co., produce brokers at Birmingham, Alabama, sent by defendant company to complainants, who were produce dealers at Memphis, this telegram: "Quote cribs loose, and strips packed." Thereupon complainant wrote out upon the usual printed blanks of the defendant company, and delivered to the proper agent of the defendant for transmission, this reply, addressed to Bugg & Co., at Birmingham: "Car cribs six sixty, c. a. f.,

prompt." The word "cribs" meant, in the meat trade, clear ribs, and c. a. f. meant cost and freight. These terms were well understood in the trade, and by the defendant.

This telegram, as delivered by the company to Bugg & Co., read "six thirty" instead of "six sixty," being in other respects correct.

Thereupon Bugg & Co. ordered a car-load of the meat, amounting to twenty-five thousand pounds.

Complainants shipped the meat, and drew on Bugg & Co. for \$1,650, the price of the meat at six sixty. Bugg & Co. refused to pay the draft, relying on the telegram as received by them, and complainants accepted of them \$1,575, the value of the meat at the price of "six thirty," making a loss to complainants of seventy-five dollars.

Complainants at once notified the company of the mistake, and that the same had entailed upon them the loss of seventy-five dollars, and demanded payment of this sum, which the company declined to make.

The defendant, in its answer, says it is not liable,—

1. Because the telegram in which the error occurred fails to give any idea as to its true meaning, whereby defendant was unable to judge of its importance; that it can only be held liable for damages which it might reasonably have contemplated as a result of its error; "that it is not responsible for results flowing from a mistake in the transmission of such cipher dispatches."

2. That the dispatch not being repeated, their liability is, by the terms of the printed blank, which is the contract, limited to the cost of the telegram.

3. That in no event are they liable for the difference in the price contained in the telegram as received by it, and the price in the message as delivered by it to Bugg & Co.,—i. e., between \$6.60 per hundred pounds and \$6.30,—claiming that complainants could have recovered their meat from Bugg & Co., as it was shipped in consequence of said mistake.

There was judgment for the complainants for the sum of seventy-five dollars, with interest from the date of the delivery of the meat. Defendant has appealed, assigning errors.

It is unnecessary for us to determine what is the measure of damages for error in the transmission of a telegram written in cipher,—a question upon which the authorities are not in harmony, and one where there are very many nice distinctions and refinements.

The telegram before us is in no sense in cipher. It is an abbreviation merely, and from the proof in the cause, an abbreviation known to the company. It fully apprised the company that a proposition to sell clear rib meat in car-load lots at \$6.60 per hundred pounds was made, and the company could reasonably have anticipated that if the proposition was accepted, the writer of the message would forward the goods in expectation of such price, and that his loss, if there was an error in delivering the message by the negligence of the company would be the difference between the real value of the goods and the price at which the sender, in the exercise of reasonable prudence, might be able to dispose of them when rejected by the proposed purchaser in consequence of the error. In other words, the company knew that carelessness or mistake in the delivery of the message might expose the sender to pecuniary loss, the amount or extent of which it was not necessary for it to know. "It is only necessary that the damages be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, such as might naturally be expected to follow its violation"; and it was only necessary for the company to know that the telegram related to a matter of business which, if improperly transmitted, might lead to pecuniary loss, upon the basis above suggested, to be increased or diminished according to the particular circumstances of the case, and to be determined upon the rule of compensation to the party injured.

The second matter of defense set up in the answer, predicated upon the terms of the special contract contained in the printed blanks of the company, need not be noticed since the case of *Marr v. Western Union Tel. Co.*, 1 Pickle, 529, which settles in this state, in accord with the overwhelming weight of authority, that such stipulations will not avail the company where the damage has resulted from the negligence of its agents or officers.

The mistake or error here is clearly shown to have been occasioned by such negligence. Indeed, learned counsel for the company have not made any contention to the contrary in this court.

This brings us to the consideration of the third and serious ground of defense,—the measure of damages in this particular case.

The contention of the counsel for complainants is, and such was the view of the learned chancellor, that the company was

the agent of the complainants as the sender of the telegram, and that the complainants were therefore bound to let Bugg & Co. have the goods at \$6.30, the price erroneously named in the dispatch as delivered; and that the loss must be measured by the difference between the price at which they were willing and expected to sell, and the price which, in consequence of the error of such agent, they were compelled to sell.

In our opinion this contention cannot be maintained, either upon principle or authority.

The minds of the party who sends a message in certain words and the party who receives the message in entirely different words have never met. Neither can, therefore, be bound the one to the other, unless the mere fact of employment of the telegraph company as the instrument of communication makes the latter the agent of the sender. Upon what principle can it be said such an agency arises? The telegraph company is no sense a private agent; it is clothed by the state with certain privileges; it is allowed to exercise the right of eminent domain. In exchange for such franchises it is onerated with certain duties, one of which is the obligation to accept and transmit over its wires all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity and no power to supervise or direct the manner or means which the company use in the discharge of their duties to the public in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases. They have contracted with the company to transmit the words of the message to the party addressed, through its own agents and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken and changed the form of from the paper on which it was written, transmitted by electricity over the wires of the company and reduced to writing at its destination by an agent of the company; and that it only represents what was written by the sender in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company. Knowing the

scope of the employment and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby.

Ordinarily, there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist, the principal is not responsible for the torts of the agent; and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort, for which the telegraph company alone is responsible.

The company retaining exclusive control of the manner of performance, and of its own employees and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of "independent contractor," as defined and understood in the well-settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking.

The many and marked differences between the employment of such companies to transmit a dispatch, and the employment of a private person to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance, from his conceded liability in the last, for the negligence of the instrumentality employed.

Such a holding not only does violence to well-settled principles of the law of agency, but may lead to the absolute ruin of the party employing this useful and now necessary public medium of rapid transmission of intelligence, so that every consideration of public policy would seem to point to a different result, unless the courts find themselves constrained, by the great weight of authority, to uphold the contention here made.

How are the authorities? In England and in Scotland the idea of agency in the company so as to bind the sender upon a telegram negligently changed in the transmission is repudiated: *Henkel v. Pape*, L. R. 6 Ex. 7; *Verdin v. Robertson*, 10 Ct. Ses. Cas. S., 3d series, 35.

Mr. Gray, in his work, while stating the law to be in Eng-

land and Scotland as above, says that in this country the rule is, in general, otherwise, citing a number of cases in note 3 to section 104.

It is to be noticed, however, that this author, after making the statement above given, throws the weight of his learning and research against what he says is the tendency of the American courts, and in an instructive discussion of the question seems to demonstrate that the English rule is the correct one.

It is also worthy of remark that in the note already referred to he follows the citation of the cases which are said to make the American rule with the statement that, "as a matter of fact, it has been decided in a single instance only (*Western Union Tel. Co. v. Shotter*, 71 Ga. 760) that the receiver of an altered message is entitled to hold the sender responsible upon its terms," adding "that the principle which would allow him to do so, however, has been considered in the other cases."

Let us see what may be briefly said of the other cases.

In *Wilson v. Minnesota etc. R. R. Co.*, 31 Minn. 481, it is apparent, from pages 482 and 483 of the opinion, that the question of agency was really not involved.

With *Rose v. United States Tel. Co.*, 3 Abb. Pr., N. S., 408, we content ourselves with what Mr. Gray says of this case: "It seems to affirm that the employer of a telegraph company is responsible upon a negligently altered message, but it does not necessarily determine the question. The case decided that the plaintiff, who was the agent of the sender of a message altered through the negligence of the defendant, could not maintain an action against the defendant for the injury sustained through acting upon that alteration. The decision was rested upon the ground that the plaintiff had sustained no injury through the act of the defendant, since he had a perfect remedy for his loss against the sender of the message. The ground of this decision is open, perhaps, to objection": See sec. 78.

Continuing, the author says: "Assuming its sufficiency, it may be urged that the case in reality decided only that the employer of a telegraph company is responsible upon a negligently altered message, where the relationship of principal and agent exists between him and the receiver of that message, — a decision which does not determine the question under consideration."

Dunning v. Roberts, 35 Barb. 463, is of little weight. The

case decided simply that the defendant was responsible upon a message which was unquestionably correctly transmitted and delivered,—although it was not the one that he wished sent,—upon the ground of the relationship of principal and agent existing between himself and the actual sender of the message. The latter, moreover, in the absence of the operator of the company, telegraphed the message himself, so that no contract at all was made between the telegraph company and the defendant.

In *Saveland v. Green*, 40 Wis. 431, there was no question of a mistake in the dispatch; the only question was, whether the telegram received, where no mistake was claimed, was to be treated as the original, so as to make it competent evidence of the contents of such telegram.

Durkee v. Vermont Central R. R. Co., 29 Vt. 127, decides that the original, where the person to whom it is sent takes the risk of its transmission or is the employer of the telegraph company, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph company is to be considered as his agent, the original is the actual message delivered at the end of the line. In this case, there was no question of mistake, nor of the sender being bound thereby, but merely a controversy as to what was original and what was secondary evidence of the contents of a telegram.

Moreover, if this case decides anything pertinent to the case at bar, it is, that as Bugg & Co. first invoked the services of the telegraph company, inviting a reply from complainants through the same medium, the company, in such case, was the agent of Bugg & Co., not of complainants, so that the latter would not have been bound by the negligence of the company.

New York etc. Pr. T. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338, is a case where the receiver of an altered message, who had suffered injury thereby, was allowed to recover against the telegraph company as for a tort. If the telegraph company is the agent of the party who sent the telegram, then we are unable to see how the receiver actually suffered injury in this case, because if the sender of the telegram was bound to make good to the receiver the contract as reported in the altered message according to its terms, then the party addressed could have recovered of the sender the value of the

two hundred bouquets called for in the altered message, instead of two bouquets.

What is said in this case as to agency of the company so as to bind the sender is pure *dictum*.

Howley v. Whipple, 48 N. H. 487, the next case cited by Mr. Gray in the note referred to, so far as it touches the question now under consideration, is a mere *dictum*, and it would be uninformative, in this connection, to state what it really does decide. The character of the question before that court may be inferred from a quotation which the opinion makes from sections 340 and 341 of Scott and Jarnagin on Telegraphy, adding that "many cases are cited in the above work from which it is held that, in all controversies between the sender of the message and the company, the original message is the one left at the office by the party sending it. But where a man sends a proposition to another by telegram, and gets a reply accepting the offer, the original message, so far as binding the acceptor is concerned, is the one delivered to him at the other end."

So of *Barons v. Brown*, 25 Kan. 410; *Matteson v. Noyes*, 25 Ill. 591; *Cairo etc. R. R. Co. v. Mahoney*, 82 Id. 73; 25 Am. Rep. 299; *Williams v. Brickell*, 37 Miss. 682; *Chicago etc. R. R. Co. v. Russell*, 91 Ill. 298; 33 Am. Rep. 54; *State v. Hopkins*, 50 Vt. 316. They relate alone to the question of original and secondary evidence, so far as they touch directly or indirectly upon the matter now under consideration.

Morgan v. People, 59 Ill. 58, was where the plaintiff in an execution telegraphed to the sheriff to hold up the sale contemplated thereunder. The sheriff refused to obey the telegram, and was sued for damages by the owners of the property. It was held that the telegram delivered to the sheriff was the original, and that he should have obeyed it. There was no alteration or mistake in the telegram.

Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355, was this: Smith and Whitney, who were creditors of W. H. Easton, determined to attach his property to secure their debt. It was agreed, however, that he might telegraph to his brother, J. T. Easton, in New York, and that all parties would await the reply. W. H. telegraphed to J. T. as follows: "Smith and Whitney are here, and will attach if not secured." He received a reply, saying: "Will indorse your Smith and Whitney note, — three months." Smith and Whitney took the note of W. H. Easton at three months in satisfaction of their

claim, and sent it to J. T. Easton, in New York, for his indorsement, which was refused. Thereupon they sued him, and introduced the telegram that was received by W. H. Easton upon which they had acted. The court held that the telegram received was not evidence of a liability upon J. T. Easton, but that the message written by J. T. should have been introduced or accounted for.

This certainly decides nothing to support complainant's contention here. On the contrary, the logic of it would seem to be adverse to the idea of agency in the company; for if the company was the agent of the sender when it delivered the telegram, the telegram as delivered was the act of the principal, and ought to bind him.

We have devoted more time and space to these cases than might appear to be necessary; but as they are summed up in the note referred to by Mr. Gray as the cases that are regarded as making what is called the rule in America, it was deemed not out of place to ascertain what they were. We make and have no criticism upon what these cases do decide; we merely say that they are not authority upon which to predicate the claim that the courts in this country have established or settled the question under consideration. As already stated, Mr. Gray not only shows that upon principle the English holding is the correct one, but while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*.

There is but one case referred to by him, and the industry and learning of counsel have produced no other, which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Western Union Tel. Co. v. Shotter*, 71 Ga. 760.

With very great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued nor the conclusion therein reached. The facts of the case present the question exactly in the shape, and under the same circumstances, which we have in the case at bar. The learned judge delivering the opinion places his conclusion, in part, on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of

governmental charge of the telegraph system can make any difference; for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government, while in no sense can the company be said to be a bailee or carrier of the particular message.

Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message can be affected.

The Georgia case, however, while holding that the sender was bound to let the receiver have the goods at the reduced price stated in the erroneous message, decides that the sender is not entitled to recover from the company as damages the difference between the price as written by the sender and that delivered by the company, upon the ground that there was no evidence that the purchasers, at the points where the telegrams were received, would have given the price at which the goods were offered in the correct telegrams, nor what was the market value of the goods at the place to which they had been shipped in consequence of the error, the court holding that the measure of damages in such case was "the difference between the price offered by the error of the telegram and the market value at the point to which shipped,—that is, what the seller could have gotten there."

This case, therefore, though holding as stated concerning the idea of agency, is opposed to the conclusion of the chancellor in the case at bar on the measure of damages.

Being of opinion, then, that the complainants were not bound to let Bugg & Co. have the goods at the price erroneously communicated by the telegraph company, but that it was their privilege to have reclaimed them when Bugg & Co. refused to pay the price as written by complainants, let us see what were their rights and duties, and what is the criterion of damage in such a case. They were bound to have taken just such steps as a reasonably prudent man would take to save himself had the mistake or error been his own.

A man, under such circumstances, is not to be held to have done the wisest and best thing, but to the exercise of reasonable skill and diligence. Whether he so acted or not, is a question of fact to be left to the jury, under proper instructions by the court, in a jury case, and for the court to try as any other question of fact in chancery or non-jury cases.

What would be prudent in one case might be very unwise in another, dependent on the character of the goods, the market value in the place to which sent by the mistake, or the value at the place from which sent, regard being had to storage, expense of selling, handling, freights, depreciation of perishable goods, and fluctuations in the market, etc.

For instance, in one case it might occasion less loss to sell at the price named in the message as erroneously delivered, where the cost and risk of storage and selling on that market would be heavier than the difference in the price as sent and the price as received, or the cost of returning the goods where the freight both ways might be more than such difference. Where the difference in the price as sent and the price as erroneously delivered was greater than would be the cost of such retaining and selling there with freight one way, or greater than returning with freights both ways, regard being had to the markets at the two places, then he ought not to sell at price so named, but should retain or return according to his best judgment.

In such cases the courts will not be over-nice, on behalf of the negligent company, in adjusting the scales to the wisdom of the several means open to the party injured, and undertake to weigh carefully the question as to what was best as then appeared, and certainly not as to what was best as seen in the light of subsequent events, but will merely require the victim of the negligence to act in good faith, in the exercise of ordinary prudence in the effort to extricate himself from the situation in which he has been placed.

Where this has been done, the loss resulting will be the measure of damages which he will be entitled to recover, upon the doctrine of compensation.

It is manifest that it would be unreasonable to expect the same conduct in a case where the goods shipped in consequence of the negligence of the company were lumber, coal, or the like, where freights would be a large factor in the loss, and in a case where the goods were bonds, diamonds, and the like, where freights are insignificant compared with value; such considerations, together with the facilities for sale, proximity to other markets, and the like, are to be regarded in connection with the facts and circumstances of each particular case.

This is a summary of the result of general principles, all of which are too well settled to require citation of authority.

Applying these principles to the case at bar, we find no

proof in the record that would enable us to ascertain the damages fairly resulting from the negligence of the telegraph company. There is nothing to show what was the market value of the meat at Birmingham, nor at Memphis, unless the telegram, as written by the senders, is to be considered as fixing it. This is evidence of what the sender was willing to take for it, and in the absence of proof to the contrary, may be said to furnish evidence of the market value in favor of the party making the offer as against third parties. There is no proof as to freight either way, so that we cannot say whether the complainants have acted prudently in selling at the price named in the erroneous telegram, or whether he should have sought other purchasers at Birmingham, or recalled the meat to Memphis, or taken some other course. In the absence of some such proof it is impossible for the court to ascertain the extent of the injury inflicted by the company's negligence, so as to fix and determine the compensation therefor with certainty.

But the negligence being established, and the complainants having shown that they disposed of the goods at the price named in the erroneously delivered message, which was one of the means open to the shipper of extricating himself with the smallest loss, and there being no proof whatever tending to show that such disposition of the goods was not the very best thing to be done under the circumstances, we are of opinion that the difference between the price named in the telegram as sent and as delivered, where sale is actually made at the latter price, may be taken as the correct measure of damages, where, as in the case at bar, the difference is not so great as to excite suspicion, and where, from the character of the goods, it does not appear unreasonable and improper to make such disposition of the goods. Where the conduct of the party injured, in his effort to extricate himself from loss, does not appear to have been improvident, nor in bad faith, and the loss is shown from such conduct, the burden of proof is upon the author of the wrong to show that the loss might have been mitigated by a different course of conduct which a reasonably prudent man ought to have taken. In the absence of such proof, the loss, as shown, will be taken as the correct measure of damages in the particular case. Of this the wrong-doer certainly cannot complain, the fault being his that there is not proof that some other course of conduct would have lessened the damages.

Let the decree be affirmed, with costs.

TELEGRAPHS. — Though a telegraph company may restrict its liability, it cannot contract against the consequences of its own negligence: *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672, and note 675; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; 41 Am. Rep. 500. Yet in some cases it has been decided that such companies may restrict their liability for ordinary negligence, but never for gross negligence; but these cases are where the messages have been unreported: *Pegram v. Western Union Tel. Co.*, 97 N. C. 57; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526, and note 532; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69, and note 72; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164; 71 Am. Dec. 461; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; 96 Am. Dec. 519. But where the following telegram was written upon a blank stipulating that the company should not be liable for mistakes or delays in transmissions, etc., of any unreported messages, by the negligence of its servants or otherwise, beyond the amount received for sending the same: "Send bay horse to-day; Mock loads to-night,"—and the message was not repeated, and was delayed in transmission by defendant's negligence, and the sender lost the sale of the horse in consequence, Mock being a well-known horse-dealer, in the habit of shipping horses at that place, such stipulation did not prevent a recovery for want of ordinary care and diligence, and actual damages were recoverable: *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644, and foot-note. And so where a telegraph company received the following message for transmission: "Cover two hundred September and one hundred August," and transmitted it, "Cover two hundred September and two hundred August," the expressions being common and well understood in the cotton trade, the company was liable for the full amount of damage suffered, even though the message was not repeated according to regulations, and in such cases the telegraph company undertook to limit its liability: *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 44 Am. Rep. 776.

TELEGRAPH COMPANIES — MEASURE OF DAMAGES FOR NEGLIGENCE. — The measure of damages for neglect of the company to seasonably deliver a message agreeing to accept an offer to sell goods at a certain price, in consequence of which the bargain is lost, is the additional sum which the plaintiff would have been compelled to pay at the same place to obtain the same quality and quantity of similar goods: *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; and compare *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Dec. 446; *Rittenhouse v. Independent Line Telegraph*, 44 N. Y. 263; 4 Am. Rep. 673; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136, and note 149; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156, and note 168; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605. Where one has sold cattle for future delivery at the option of the purchaser, and the latter sends a dispatch notifying the seller that he will take the cattle in the morning of the next day, as it was the custom among cattle-buyers to take and weigh cattle at early daylight, which dispatch the com-

pany failed to deliver promptly, whereby the weighing was delayed, and the weight of the cattle decreased, the seller may recover for the loss in weight so resulting from the company's negligence: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191. But in an action against a telegraph company for damages resulting from the inaccurate transmission of a dispatch, damages cannot be recovered on account of the loss of anticipated profits, based upon the probability of plaintiff's horse being the winner in a trotting-race, for such damages would be remote and speculative: *Western Union Tel. Co v. Crall*, 39 Kan. 580.

MOORE v. TATE.

[87 TENNESSEE, 725.]

SOVEREIGNTY — SUITS BY AND AGAINST STATE. — Sovereign state may bring and maintain suit as any other suitor, but cannot be sued in its own courts, or in a foreign court, without its consent and permission, signified either by statute or by some other unequivocal means.

SOVEREIGNTY — ACTION BY STATE. — State having voluntarily placed itself in position of suitor, whether in its own courts or in those of a sister state, will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action upon which the suit was brought.

SET-OFF. — TENNESSEE STATUTORY RIGHT OF SET-OFF is incidental to and dependent upon the fact of the plaintiff having established a right of recovery against the defendant. If this fails, the right of set-off does not exist.

SET-OFF — WHEN NOT AVAILABLE AGAINST STATE. — Immunity from suit possessed by state as a prerogative of its sovereignty applies to a cross-action by set-off, unless otherwise expressly provided by statute.

SET-OFF, ETC. — Tennessee statute, Milliken and Ventrees's Code, section 3628, regulating set-off and cross-action, has no application in suits brought by the state in its own courts, and the defendant in such suit cannot avail himself of an independent claim, not growing out of or connected with the subject-matter of the original suit, as a defense or otherwise, and this rule also applies when a sister state is the plaintiff in the suit.

Heiskell and Heiskell, for the plaintiff in error.

Gantt and Patterson, for the defendants in error.

FOLKES, J. This was an action brought in the circuit court of Shelby County, to recover of Sam Tate and associates the balance due, after allowing sundry credits, upon the following acceptance: —

"MONTGOMERY, ALA., March 28, 1873.

"Sixty days after date, pay to the order of M. G. Moore, commissioner for the state of Alabama, or order, twenty thousand dollars, at the banking house of Josiah Morris & Co.,

Montgomery, Alabama, for value received in settlement of the penitentiary lease.

[Signed]

"SMITH AND McMILLAN.

"By WM. SMITH, Agent.

"Accepted:

"CAMPBELL WALLACE.

W. B. GREENLAW.

"J. W. SLOSS.

M. B. PRICHARD.

"SAM TATE.

M. J. WICKS."

The parties thus accepting the draft composed the firm of "Sam Tate and associates."

Defendants pleaded *nil debit*, payment, statute of limitations, and a special plea of set-off, wherein it was alleged that defendants were the owners and holders of certain coupons then due, issued by the state of Alabama to cover semi-annual interest on certain bonds of said state, which coupons, it was alleged, had been presented to said state of Alabama for payment, and payment refused, and that the state declined to allow the said coupons as a credit on said acceptance; that said coupons, with interest thereon at the rate of eight per cent (the legal rate in Alabama, where said coupons are made payable), exceed the balance due the state of Alabama on the acceptance, after allowing the like rate of interest, wherefore they say that "defendants hereby offer said coupons, and the interest due thereon, as a set-off against plaintiff's demand, and ask that the same be allowed to the extent of the balance due plaintiff; and by reason of the averments set forth herein, the plaintiff is not entitled in this action, to any other or further judgment against them except a judgment for the costs of this suit."

The state joined issue on the pleas of *nil debit*, payment, and statute of limitations, but demurred to the set-off or cross-action, and for cause of demurrer set down the following:—

"1. That the state of Alabama is not subject to suit, either original or by cross-action.

"2. The claim sued on is one due the penitentiary of the state of Alabama, contracted with the state in a settlement of a business and commercial transaction, while the set-off is upon coupons from bonds of the state, issued by it in its sovereign capacity, and on which the state is not subject to be sued, but for which the holder can look alone to the honor of the state."

There were other grounds of demurrer, which need not be stated.

The court overruled the demurrer. Plaintiff interposed additional replications, to which defendants demurred, which, being overruled in part and sustained in part, led to further pleadings, none of which need be mentioned, in the view we have taken of the case.

Such further proceedings were had that the cause came on, finally, to be heard before the circuit judge, without the intervention of a jury, when it was made satisfactorily to appear, and it was so adjudged, that there was due the plaintiff on said acceptance, after allowing all credits properly pertaining thereto, a balance of \$5,702.97; and that there was due the defendants on matured coupons detached from bonds of the state of Alabama, as alleged in their several pleas of set-off, with interest thereon, the sum of \$7,069.39. The final entry, after finding the respective amounts as just stated, continues as follows: "Thereupon plaintiff moved the court, notwithstanding the pleas of defendants, to render judgment in favor of the state of Alabama against them for said sum of \$5,702.97; and the defendants, on the contrary, insisted that, as it appeared the state of Alabama owed them more than said amount on said matured coupons in their said pleas pleaded as as a set-off or counterclaim, the plaintiff was only entitled to a judgment for costs, and that said set-off or counterclaim should be allowed to the extent of plaintiff's said demand. The court is pleased to disallow the motion of plaintiff, and to allow the defendants said set-off or counterclaim to the extent of plaintiff's demand.

The court thereupon ordered that the clerk cancel and surrender to plaintiff's attorney so many of said coupons as would, with interest, amount to the \$5,702.97, and to return the remaining coupons to defendants. Judgment was then rendered against defendants for costs only.

From such final judgment plaintiff has appealed in error.

The party for whose use the suit is brought is the real plaintiff; so that the state of Alabama is, to all intents and purposes, the party plaintiff in the action brought to recover judgment on the acceptance set out in the declaration.

While a sovereign state may bring and maintain a suit as any other suitor, she cannot be sued in her own or a foreign court, unless she has signified her consent thereto, either by statute or by some other unequivocal means.

These universally recognized principles are not challenged by the learned counsel for the defendants, but his contention

is, that the state of Alabama, having invoked the jurisdiction of the courts of this state, for the purpose of recovering a judgment against a citizen of Tennessee, must submit itself to the same jurisdiction for the purpose of allowing such citizen to interpose any defense he may have, to the extent of preventing any recovery against him; "that when the state undertakes to litigate with the citizen the latter may, by way of set-off or counterclaim, make such defense as will defeat the recovery, though not entitled to a judgment over against the state, in the absence of some legislative enactment authorizing the recovery."

This contention goes too far. It is true that when the state voluntarily places itself in the position of a suitor, whether in its own courts or in those of a sister state, it will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action sued on, and the defendant would be entitled to plead and prove any and all matters properly defensive, including credits and set-offs, so far as the latter are dependent on, connected with, and grew out of the transaction which constitutes the subject-matter of the suit: See *State v. Ward and Briggs*, 9 Heisk. 111; *Tappan v. W. & A. R. R. Co.*, 3 Lea, 106.

Such defenses, though sometimes called set-offs, are not strictly set-offs. "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits, which, for convenience of procedure, are combined in one action,"—as was said in *Winterfield v. Bradnum*, L. R. 3 Q. B. 326; 4 Am. & Eng. Ency. of Law, 332, and cases cited.

Set-off was unknown to the common law. It was allowed in England by statute, 2 George II., chapter 22, which has in the main been generally adopted in this country.

As introduced into this state by statute, the right of set-off is incidental to and dependent upon the fact of the plaintiff having established a right of recovery against the defendant. If this fails, the right of set-off does not exist: *Edington v. Pickle*, 1 Sneed, 122. Such was the construction given to the act of 1815, chapter 53.

It was likewise restricted in its operation to the abatement or extinguishment of the plaintiff's demand, as the case might

be. Under the act of 1852, carried into the code, section 3632 (Milliken and Ventrees), where the set-off pleaded by the defendant is found to exceed the claim of the plaintiff, the court is directed to render judgment in favor of the defendant, and against the plaintiff, for the excess of the set-off over the plaintiff's demand.

"The plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants; but if the defendant has pleaded a set-off or counterclaim, he may elect to proceed on such counterclaim in the capacity of a plaintiff": Milliken and Ventrees's Code, sec. 3678.

In this connection, it may be stated that the record in this case shows that when the plaintiff's demurrer to defendants' plea of set-off was overruled, the plaintiff moved to be allowed to dismiss his suit, which was by the court refused, upon the defendants electing to proceed, in the capacity of plaintiffs, to have their counterclaim adjudged to the extent of plaintiff's demand.

Not being allowed to dismiss unconditionally and absolutely, so as to carry the whole case, the plaintiff, reserving exceptions to the action of the court, elected to continue the prosecution of its suit.

The statute enacts that mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered, may be pleaded by way of set-off or cross-action: Sec. 3628, subd. 1.

To give to the language of this statute a literal meaning would be to allow defendants' contention. But are we authorized to do so? Such reading would also embrace a debt barred by the statute of limitations, a gambling debt, a demand for usury, a premium *pudicitix*, any demand *turpi causa*, or against public policy. It is manifest that none of these mutual demands are within the meaning of the statute, because they are not enforceable by suit at law.

The evil that the statute was intended to remedy was, that where two persons held separate and disconnected debts against each other, they were driven to the expense and vexation of two separate suits. As the books say, they were "distinct and inextinguishable except by actual payment or release." The statute was intended to dispense with the necessity for two suits, and to permit one suit to settle the whole. It did not give, and was not intended to give, a right

of suit to either party where none existed before, or make other change in rights, but merely to pool the remedies. The mutual demands referred to and provided for were such, and such only, on which separate suits would lie independent of the statute.

In 7 Wait's Actions and Defenses, 477, it is said: "And it is laid down as a rule that a claim is available in set-off at law only when it is a debt on which the defendant could maintain an action at law against the plaintiff." To this general proposition the author cites numerous authorities, covering a great variety of claims on which suits will not lie at all, or cannot be brought by a defendant in his own name and right. Among the cases cited for the text as above quoted is *Battle v. Thompson*, 65 N. C. 406, where it was expressly adjudged that a party sued on a bill single, payable to the public treasurer, given for cotton sold by such treasurer, could not plead by way of set-off to such action valid coupons taken from the bonds of the state. The judge delivering the opinion says: "The test of a set-off or counterclaim under the statute is this: Could the defendant maintain an action against the plaintiff? Tried by this test, the defense fails, for a citizen cannot maintain an action against the state."

If our own consideration of the question had not led us to the same conclusion, we would be constrained to give much weight to this decision, in view of the fact that our statutes on the subject are derived from North Carolina as the mother state.

Whether a state should consent to be sued, so as to put itself on an equality with the citizen, is not a matter for the courts, but for the legislature.

Our own state for a while authorized itself to be sued, but by act of 1865, chapter 36, section 34, repealed the statute authorizing such suits, which repealing statute was held not obnoxious to any constitutional objections: *Watson v. Bank*, 3 Baxt. 395.

The same considerations of public policy which prompted the legislature to prohibit suits directly against the state would lead the courts to hold that she should not be sued indirectly, under the general terms of the statute of set-offs, which do not expressly allow such suit.

If such right to plead a set-off exists as against the state by force of the statute (and it cannot exist without the statute as to matters not growing out of and connected with the particu-

lar transaction), then it must necessarily follow that the defendants would be entitled to judgment over for the excess, for the right to judgment for such excess is as much an essence of our statute as is the right to plead the set-off defensively since the act of 1852.

When the defendants here opposed the effort of the plaintiff to take a nonsuit, did they not do so under the statute which authorized them to proceed in the capacity of plaintiffs? If in the capacity of plaintiffs they prosecuted their set-off, are they not suing the state? Does the fact that they only asked to have their claim adjudged to the extent of plaintiff's demand make them any the less plaintiffs when they hold the state in court against its will for the purpose of having the set-off adjudged?

The defendants insist that if such were the proper construction to be applied to our own state, it should not be extended to a foreign state, who is permitted to sue, in our own courts, a citizen of this state; that this is carrying comity too far. It would certainly be but scant courtesy to a sister state to extend to her the privileges of a suitor in our courts were we to couple with such privilege burdens which are not incident to such position when not assumed by this state.

It is difficult to anticipate to what excesses such conduct might lead, and to what extent retaliatory measures might be carried.

But apart from such selfish considerations, it is sufficient to say that it is without exception, so far as we know, that the courts of one state, in dealing with a sister state, extend to it all the privileges enjoyed by the state in which the court is held, unless there be some imperative rule of law to the contrary.

So that, in the consideration of the case at bar, we have treated, and propose to treat, the question as though it concerned the state of Tennessee.

Set-off, as we have seen, not being known to the common law, if it exists as against a sovereign state, must rest upon the statute. If our statute authorizes it at all, it necessarily authorizes it to the full extent given by the statute to private suitors, for there is nothing in its terms to give it a qualified or purely defensive operation; so that in all cases where the state might be driven to the necessity of bringing suit against a citizen, such citizen must be allowed to interpose a claim for an independent demand, and after satisfying,

it may be, a small demand of the state by the set-off, have judgment over against the state for a large one. In this way, the bonded indebtedness of a state, issued in its sovereign and political capacity, predicated entirely upon the faith and credit of the state, to be provided for by the legislative branch of the government, might be made the subject of suit by such indirection. So, too, every tax-payer might discharge his obligations to the government, in those states where taxes are a personal debt as well as a lien upon the property assessed, to the impoverishment of the state government.

But it is said that this right of set-off is not applicable to taxes, because of the necessities of government, which require that nothing should stand between the state and its revenues, its life-blood, and that a claim or demand based upon commercial paper or other like evidence of indebtedness stands upon a different footing. If we were to admit that there is a difference in the character of the debts supposed, it does not follow that the courts can for themselves declare such difference, in the application of the statutes of set-off, where the statutes themselves make none.

In construing the statutes in question, we are to ascertain whether the state is or is not within their operation. If not, that is an end of the controversy. If within the statute, where is the authority for the courts to regulate its scope and application? How, and by what authority, are we to say that certain debts of the state are within and others without the operation of the statute?

If we are told that we should apply it to all suits except for revenue, who is to determine, and how are we to say, what demands are "for revenue only"? Are taxes the only sources of revenue? Our own state leases its penitentiary for one hundred thousand dollars a year. Ways and means and appropriations are doubtless predicated as much upon this source of income as upon a like amount of assessed taxes. What is the principle, and what the rule, upon which the courts are to refuse a set-off in a suit for assessed taxes, and allow it in a suit for rent due under the penitentiary lease?

Illustrations might be multiplied of the sources of income to the state, and of the difficulty of determining whether they are to be considered as revenue.

That set-off against taxes due the government will not be allowed has been held in the following cases: *Newport Bridge Co. v. Douglass*, 12 Bush, 673; *Cobb v. Elizabeth City*, 75

N. C. 1; *City of New Orleans v. Davidson*, 30 La. Ann. 541-554; *City of Camden v. Allen*, 26 N. J. L. 399; *Peirce v. Boston*, 3 Met. 520; *Shaw v. Peckett*, 26 Vt. 486.

The case of *State v. Franklin Bank*, 10 Ohio, 91, referred to by counsel for defendants, was an agreed case, where the state, by its attorney, consented to try the question of set-off to the claim for taxes.

That the immunity from suit possessed by the state as a prerogative of its sovereignty applies to a cross-action by set-off, unless expressly provided otherwise by statute, is fully sustained by the following adjudications, which we have examined: *State v. B. & O. R. R.*, 34 Md. 344; *Chevallier's Adm'r v. State*, 10 Tex. 315; *Commonwealth v. Matlack*, 4 Dall. 303; *State v. Leckie*, 14 La. Ann. 636; *White v. Governor*, 18 Ala. 767; *Treasurers v. Cleary*, 3 Rich. 372. This last case virtually overrules, without referring to, the Gaillard case, in 1 Bay, cited by defendant's counsel.

Counsel for defendants press upon us certain cases which they insist sustain their contention. We have examined them all, together with others not referred to, and while the argument in some of them does go to the extent claimed for them, they are found, so far as the point decided is concerned, to be bottomed upon the United States statute, so far as they have any solid support. Let us now glance briefly at these cases.

Schaumburg v. United States, 103 U. S. 667, is merely an affirmance of the case of *United States v. Eckford*, 6 Wall. 484. The latter case shows clearly that "this is a question which arises exclusively under the acts of Congress, and no local law or usage can have any influence upon it." Again, in this case it is said: "No action of any kind could be sustained against the government for any supposed debt, unless by its own consent; and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit."

This was a case where, after allowing credits to the extent of the government's demand (which was permissible, as we have seen, independent of statute, where the credits grew out of the government's demand, and which was allowable under the United States statute to the extent of the demand, independent of the origin of the credits), the circuit court had rendered judgment for the excess due by the government. The action of the circuit judge was sought to be justified by the state statute of New York, which authorized such judg-

ment for the excess. The supreme court held that the state statute could not confer jurisdiction to render such a judgment,—it was not a question of practice, but of jurisdiction; and its action in allowing the set-off to be pleaded, even defensively, to the extent of the government's demand, is placed upon the act of Congress. The judge delivering the opinion used this language: "When the United States is plaintiff, and the defendant has pleaded a set-off, *which the acts of Congress have authorized him to do*, no judgment can be rendered against the government," although there is an excess due the defendant. (The Italics are ours.) The act of Congress referred to is that of March 3, 1797, chapter 74, sections 3 and 4: 1 Stats. at Large, 515.

It is said in *Powers v. Central Bank*, 18 Ga. 658, which will be presently noticed, that this act of Congress does not grant any power or right to plead a credit or set-off, but merely restricts a right already existing.

That such is not the view of the supreme court of the United States—the court of last resort as to construction of acts of Congress—is shown by their language in this case of *United States v. Eckford*, 6 Wall. 484. After citing and giving the substance of the act of March 3, 1797, the judge delivering the opinion says: "The extent of the authority conferred by that section is as plain as any grant of power can well be which is conferred in clear and unambiguous language": Page 489.

To the same effect is *United States v. Robeson*, 9 Pet. 319, and *United States v. Giles*, 9 Cranch, 212, both of which cases show that but for the statute in question, no set-off, even defensively, would be allowed against the government. See also *United States v. Wilkins*, 6 Wheat. 135.

The case of *The Siren*, 7 Wall. 154, stands upon the idea that while the vessel itself could not be proceeded against by one holding a maritime claim so long as she was in the possession of the government, yet, when the vessel is sold, and the proceeds are in the registry of the court, such funds will be distributed by the court according to priorities as they exist under admiralty laws.

Hence it was that the owners of a vessel and cargo that had been sunk by the carelessness of the prize crew in charge of the *Siren* were allowed compensation out of the funds realized by the sale of the prize. The decision clearly recognizes that the claim for such damages could not be made against a ves-

sel of the United States, and the disposition of the case rests largely upon the analogy to the assumed liability of government property for salvage, or general-average contribution.

At all events, there is nothing in this case that stands in the way of the conclusions we have reached in the case at bar. And it must be admitted that there is a good deal of force in the suggestion of the dissenting judge, that "there is certainly some difficulty in distinguishing between a proceeding against the fund in the registry and a proceeding against the vessel itself," although his quarrel with the opinion of the majority was upon another ground.

In *United States v. Mann*, 2 Brock. 9, though the learned judge discusses at length the inherent right and justice of a claim of set-off, he finally rests the decision upon the act of Congress already referred to. It is needless to refer specially to any of the other cases from the federal courts, as they will be found to rest upon the act of Congress in question.

In *Commonwealth v. Owensboro and Nashville R. R. Co.*, 81 Ky. 573, the court does say that "when the state undertakes to litigate with the citizen, the latter may, by way of set-off or counterclaim, make such defense as will defeat the recovery, but is not entitled to a judgment over against the state, in the absence of some legislative enactment authorizing the recovery." This is the language of defendants' contention. It is sufficient to say of this case that it contains no discussion of the question,—it cites no authority. It was a suit of for taxes, and it was adjudged that no taxes were due. So that at best it is a *dictum* merely.

Again, in *Sinking Fund Commissioners v. Northern Bank of Kentucky*, 1 Met. (Ky.) 174, the announcement was equally uncalled for, for the reason that the suit was not by the state, but by a corporation created by the state, subject to sue and be sued. Even if the suit had been by the state, the set-off interposed was that of an encumbrance on the property bought by the defendant. It grew out of the same transaction, and would have been admissible in our state under the doctrine to be found in *State v. Ward and Biggs*, 9 Heisk. 111.

State v. Gaillard, 1 Bay, 500. This case is extremely brief, and seems to rest upon an amercement act which it is impossible to understand from the meager reference to it in the opinion; no discussion, and no authority cited. It is virtually a set-off allowed against a tax, however, and is therefore unsustainable on any ground short of a direct statute.

Powers v. Central Bank, 18 Ga. 658, it must be admitted, goes to the full length claimed by the counsel for defendants. It is, however, involved in this dilemma: after referring to some of the federal court cases where set-offs were allowed, it says that it might be supposed that they rested upon the act of Congress of 1797, and it undertakes then to say that "this act gives no right whatever to plead a set-off or use any discount, but regulates and restrains a right as already existing," while the case closes with this language: "If we might presume so far, we would respectfully recommend the passage of a law by our state legislature substantially the same as the act of 1797, expressly allowing to defendants when sued by the state the privilege of pleading by way of set-off or discount any demand, legal or equitable, which they might have or hold in their own right against the state, provided no judgment be rendered for any excess," etc.

Somewhat illogical is the suggestion that the legislature should pass an act "substantially the same as the act of 1797, expressly allowing set-off," when the argument leading to the decision had assumed that the act in question gave no right whatever, but merely limited a right already existing independent of the statute.

The earnestness and ability of counsel for defendants, who were successful in the court below, and the importance of the question, which is for the first time presented for adjudication in this state, must be our excuse for reviewing the authorities cited, when our own conclusions had already been reached with confidence and satisfaction, at least to ourselves, and when principle and authority were ample in our support.

As has been said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and may withdraw or withhold its consent whenever it may appear that justice to the public requires it": *Beers v. Arkansas*, 20 How. 529.

Where and how can it be said that the state of Alabama has consented to be sued on the coupons declared on in the plea of set-off here? The only answer vouchsafed is that by

voluntarily bringing her suit against the citizen, she thereby signifies her consent to the cross-action. The logic of which is, that she can never maintain her action against a recalcitrant debtor without at the same time exposing herself to the hazard of being met and overwhelmed with the presentation of her outstanding securities which the exigencies of the government may have rendered it necessary to withhold payment of, in whole or in part, temporarily or otherwise; and all this upon the construction of a statute which does not in terms apply, and was manifestly never intended to apply, to the sovereign.

But without further discussion, we hold that an independent claim cannot be set off against a demand of the state, defensively or otherwise, without the affirmative consent of the state, and that the courts of this state will apply to a sister state suing here the same rule in this respect that is applicable to our own state when a plaintiff.

It follows, therefore, that the judgment of the circuit judge must be reversed, and judgment rendered here for the full amount of the balance due on the acceptance sued on, as ascertained in the judgment of the court below, with interest and costs.

SOVEREIGNTY — SUITS AGAINST THE SOVEREIGN: See monographic note to *Orleans Navigation Co. v. Schooner Amelia*, 12 Am. Dec. 517-519. The government, as a sovereign, cannot be sued: *United States v. Murdock*, 18 La. Ann. 305; 89 Am. Dec. 651; unless by its own consent: *Hunsaker v. Borden*, 5 Cal. 288; 63 Am. Dec. 130. The state may sue in the courts of Ohio: *Spencer v. Brockway*, 1 Ohio, 259; 13 Am. Dec. 615. But a state cannot be sued in her own courts, unless there is an enactment of the legislature providing the manner and in what courts she may be sued: *Divine v. Harvie*, 7 T. B. Mon. 439; 18 Am. Dec. 194.

COUNTERCLAIM, NATURE AND EXTENT OF: *Woodruff v. Garner*, 27 Ind. 41; 89 Am. Dec. 477, and extended note.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

COATES v. CALDWELL.

[71 TEXAS, 19.]

HOMESTEAD, WHAT IS SUFFICIENT DESIGNATION OF. — The head of a family by living on a tract of land of less than two hundred acres with his family, as his home, thereby sufficiently designates it as his homestead, although he may own another tract in another county.

COTTON GROWN ON HOMESTEAD WHILE UNPICKED IS EXEMPT FROM EXECUTION; but when it has been picked the exemption ceases.

MEASURE OF DAMAGES FOR SUING OUT INJUNCTION to enjoin the sale of personal property seized in execution, where some of the property was subject to execution, is the value of the property which was subject to execution.

DEFENDANT IN INJUNCTION SUIT MAY, WITHOUT SERVING CITATION UPON SURETIES upon the injunction bond, upon proper pleadings and proof, recover his damages for the wrongful suing out of the writ of injunction.

INJUNCTION suit. The opinion states the case.

Marshall and Gillespie, and Stemmons and Field, for the appellants.

S. W. Caldwell and W. M. Mann, for the appellees.

GAINES, A. J. This suit was brought by appellant Coates to restrain the sale of certain cotton levied upon under execution against him. The writ was issued upon a judgment rendered in a justice's court for seventy dollars in favor of appellee Caldwell, and was levied upon the cotton by appellee Mann, who was constable of the precinct. The property levied upon consisted of about 1,800 pounds of cotton picked but not

removed from the field, and about 1,050 pounds matured but not picked. The petition alleged that the cotton was raised upon the homestead of plaintiff, and claimed that it was exempt from levy and sale on that ground. The defendants denied in their answer that the land upon which the cotton was grown was the homestead of the plaintiffs; denied also the exemption in any event; and pleaded in reconvention the loss of the debt as damages for the wrongful suing out of the injunction. The sureties upon the injunction bond were not cited to answer the plea in reconvention, but upon final hearing the court dissolved the injunction and gave judgment in favor of Caldwell, against them, as well as against the plaintiff, for his damages to the amount of his debt, as claimed by him. All the defendants in the judgment appeal.

It is assigned that the court erred in dissolving the injunction, and also in rendering judgment against the sureties on the injunction bond without service of citation of the plea in reconvention.

As bearing upon the question of the exemption, appellees insist that the testimony does not show that the land upon which the cotton was grown was the homestead of plaintiff. The plaintiff testified that the land consisted of 160 acres, upon which he lived with his family, — a wife and five children; that it constituted his home, both at the time the cotton was grown and when the levy was made, but that he "had never had it designated as such," and that he owned another tract of ninety acres in another county, which was not fully paid for. Appellees claim that he must have designated his homestead before he could claim his place of residence as exempt. We think, however, that by living upon the land with his family, as his home, the plaintiff designated that property as his homestead. There being less than two hundred acres, it was not necessary to define the boundaries. We presume the witness meant to say that he had never designated his homestead in the mode provided for by the statute (R. S., arts. 2343 et seq.); but the statute applies to cases in which exemptions are claimed in tracts of land which exceed the limits allowed by the constitution and laws.

The levy upon the cotton presents two questions which have not been decided in this court: 1. Is cotton which has been grown upon the homestead subject, in any event, to the levy of an execution? 2. Is a matured crop not severed from the homestead land so subject?

In *Alexander v. Holt*, 59 Tex. 205, it is held that the crops upon a homestead, while growing, are exempt from execution; but nothing is said as to those which are ripe, but not harvested or gathered. Conceding, for the sake of the argument, that an unsevered crop not upon the homestead is subject to levy and sale, we have quite a different question here. Upon a levy upon such property, the officer must either take possession of the land to gather the crop or must sell it ungathered. In the latter case, the right would pass to the purchaser at the sale to go upon the land and take off the crop. In order to complete a sale, or to make it effective, possession must be taken of the land upon which the crop is found, and for a time, at least, the officer or purchaser must exercise dominion and control over it. This, in our opinion, is an invasion of the homestead right, and cannot be permitted. It may be that, as between the execution creditor and the owner of the homestead, the crops, until severed, should be deemed a part of the land. But this we need not decide. The reasons given in *Alexander v. Holt*, *supra*, for holding crops growing upon the homestead exempt, apply to matured crops, but not with the same degree of force. We conclude that the unpicked cotton was not subject to levy.

As to the cotton which had been, we are of opinion that it was not exempt. We are cited to no case in which the question has been directly passed upon in this court. The decisions in other states are not numerous, but the weight of the authority is, that crops which have been grown upon a homestead are not exempt merely for that reason. Such is the ruling in California: *Horgan v. Amick*, 62 Cal. 401; and in North Carolina: *Citizens' Nat. Bank v. Green*, 78 N. C. 247. The supreme court of Georgia holds the contrary doctrine: *Marshall v. Cook*, 46 Ga. 301; *Wade v. Weslow*, 62 Id. 562. The latter case goes the extreme length of holding that livestock purchased with the proceeds of crops grown upon the homestead is also exempt. We think the framers of our constitution intended to go no further in that instrument than to exempt the homestead itself. They gave the legislature the power, and made it its duty, "to protect by law from forced sale a certain portion of the personal property of all heads of families": Const. 1876, art. 16, sec. 49. It is evident that it was not intended by the constitution itself to exempt any personal property. The legislature has provided a most liberal protection, and, among numerous other articles, exempts "all

provisions and forage on hand for home consumption": R. S., art. 3335. Nothing is said as to crops which have been produced upon the homestead; and we think this plainly shows that it was not contemplated that they should be protected from forced sale merely upon the ground that they were so produced. The same intention is manifested by the exemptions to be set apart to the widow and children in the administration of estates: R. S., arts. 1993 et seq. The exemption laws of California are similar to ours, though we infer they are wholly statutory. The construction placed upon them by the supreme court of that state is based upon considerations similar to those by which we have reached our conclusion upon this question.

It follows, we think, that the court below erred in not holding the unpicked cotton exempt from execution. There was only eighteen hundred pounds of that which had been gathered, which, at two and a half cents per pound (the only estimate placed upon it in the testimony), was worth but forty-five dollars. The injunction only forbid the officer's interference with the cotton, and did not otherwise restrain the writ. The value of the cotton subject to the levy was the limit to which the defendant (Caldwell) was entitled to recover for the wrongful suing out of the writ. The error of the court has, therefore, operated to the prejudice of appellants, and the judgment must be reversed.

The authorities from other states seem to hold that in the absence of an express provision, a statute authorizing judgment to be rendered against sureties on an injunction bond for the damages for wrongfully suing out the writ, the sureties must be cited, or an independent action must be brought on the bond: *Elder v. New Orleans*, 31 La. Ann. 500; *Henley v. Cliborne*, 3 Lea, 213; *Hayden v. Keith*, 32 Minn. 277. But it is held by this court, in *Sharp v. Schmidt*, 62 Tex. 263, that the defendant may recover his damages for the wrongful issue of the writ of injunction, upon the proper pleadings and proof, without serving citation upon the sureties. We think this practice was clearly contemplated by the laws existing at the time the Revised Statutes were adopted: Paschal's Digest, art. 3936. The commissioners who made the revision say in their report, in effect, that in preparing the title on injunction, they had carefully preserved the substance of the former laws: Sayles's Tex. Civ. Stats. 728. This title was adopted by the legislature as reported by the commissioners. Under

these circumstances, we feel constrained to adhere to the ruling in the case last cited, and to hold that a citation to the sureties was not necessary in this case.

For the error pointed out, the judgment is reversed, and the cause remanded.

HOMESTEAD. — OCCUPANCY IS ITSELF EVIDENCE OF ELECTION AS A HOMESTEAD, in Michigan, by the owner of the parcel so occupied, and notice to all of its homestead character: *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554; compare *Deville v. Widoe*, 64 Mich. 593; 8 Am. St. Rep. 852; *Charles v. Lamberson*, 1 Iowa, 435; 63 Am. Dec. 456; *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219; *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112; *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493; *Tumlinson v. Swinney*, 22 Ark. 400; 76 Am. Dec. 432; *Phelps v. Rooney*, 9 Wis. 70; 76 Am. Dec. 244. In Texas, articles 2343, 2344, and 2345, of the Revised Statutes relate only to rural homesteads, providing or designating the homestead out of a tract of land of more than two hundred acres upon which the party resides; it cannot apply to an urban homestead: *Equitable Mfg. Co. v. Norton*, 71 Tex. 683.

MCDANNELL v. RAGSDALE.

[71 TEXAS, 23.]

PROTECTION OF HOMESTEAD EXEMPTION IS STILL RETAINED BY WIFE AND MINOR CHILDREN of a man who has left the state and desires them to follow him, so long as they remain upon the homestead left by him. Upon the husband's leaving the state, the wife becomes the head of the family, and she cannot be prevented from remaining in the state and continuing the occupancy of the home, whatever may be the purposes or desires of the husband after leaving the state.

HOMESTEAD IS NOT ABANDONED BY DESIRE OF CLAIMANT TO SELL IT, or by his desire for future abandonment thereof, so long as it is actually occupied by him.

SALE OF HOMESTEAD CANNOT BE FRAUD ON CREDITOR OF CLAIMANT, since such creditor has no interest therein which may be used in payment of his debts.

APPEAL. The opinion states the case.

Neill and Friederich, and Fisher, Townes, and Fisher, for the appellant.

W. A. Wright, West and McGown, and Walton, Hill, and Walton, for the appellee.

WALKER, A. J. The question involved here is, whether the wife and minor children of a man who has left the state and desires that they follow him still retain the protection of the homestead exemption while they remain upon the homestead left by the husband and father.

It has been held that one family is not entitled to exemption for two homesteads at the same time, and that where two places of residence are owned by the head of the family within the state, that the husband, as head of the family, can designate which of the two shall be the home of the family, thus selecting the homestead and designating the place of exemption: *Holliman v. Smith*, 39 Tex. 362; *Clements v. Lacy*, 51 Id. 158.

It is also settled that the creditors of the husband have no interest in the homestead as property which may be used in payment of his debts, and therefore that in the sale or disposition of it there can be no fraud against the creditor: *Cox v. Shropshire*, 25 Tex. 123.

It may also be assumed that if the wife determined to do so she cannot be prevented from remaining in the state and continuing the occupancy of the home after the husband has left, whatever may be the purposes or success of the husband after leaving the state.

It would follow, then, that until the wife shall follow the husband, or part with the home to which the laws extend their protection, the creditor of the husband could not interfere with her rights and that of her children in the homestead. Upon the husband's leaving the state, she became the head of the family: *Kelley v. Whitmore*, 41 Tex. 649, and cases cited.

In this case, the ability of the wife to join her husband with their children seems to have depended upon a sale of the property. Her wish to sell and desire for future abandonment should not render it subject to seizure and sale while so occupied in fact.

The court submitted the issues raised by the testimony in charge. "If you find, from the evidence, that Joseph Weber (the husband) in good faith, without any intention to defraud his wife in her homestead rights, left his homestead on the land in controversy prior to June 4, 1883 (the day of the levy under which plaintiff claims), with intent never to return to it and occupy it as a homestead (unless he left with the intention in subdivision No. 4 of this charge), you will return a verdict for plaintiff. In this connection, you are instructed that, no matter how long or how far Weber may have wandered from his homestead (if he had one), yet if he had an intention to return thereto, it would not constitute an abandonment of the homestead. Moreover, before the homestead character will be lost, it must be undeniably clear, and be-

yond all reasonable ground of dispute, that there has been a total abandonment without an intention to return and claim the exemption. But it is not necessary that another should be acquired, provided there is the intention to abandon, and an actual abandonment of it."

"4. If you find, from the evidence, that Joseph Weber did leave his homestead and emigrate to the territory of Arizona, with the intention never so return and claim it, yet if you find that he intended his family to remain on said homestead until it could be sold, and the family did so remain until the fourth day of June, 1883, then there was not such an abandonment of the homestead as would render it liable to execution, and if you so find, you will return a verdict for defendant."

These propositions are as favorable to the plaintiff's case made in the testimony as the law as held by our courts will permit.

Holding as we do that the homestead once acquired is not abandoned while the wife and children are in fact residing thereon, it was not error in the court to refuse the instructions asked as to the effect of the husband's acts and purposes for the future after he had left the state upon the homestead character of the premises occupied by his family in Texas. The acts and declarations of both the husband and wife on the subject of removal to Arizona were properly in evidence. There would be no fraud in the purpose, if shown that the wife and children should remain until they could effect a sale of the homestead. She had the legal right to do so. There is some conflict in the testimony. If the witness Westbrook is to be believed, the wife in fact had followed her husband to Arizona before the levy. This would have authorized a verdict for the plaintiff. This testimony is contradicted, and the jury were the judges of the credibility of the witnesses examined.

The case, as it appears from the testimony, is, that the husband left Texas to seek a location; after wandering for months, he stopped at a railroad village in Arizona; bought property with his wages, and wrote to his wife to join him. She had remained with her children, and did not have the means to join her husband without making sale of the homestead. At the time of the levy she and her children were living on the premises levied upon. The husband was insolvent, having failed in business as saloon-keeper in Texas. In Arizona, he

had taken up his former trade as barber. On hearing of her husband's wishes as to change of residence, the wife put the place into hands of land agents for sale, intending to leave as soon as she could sell.

The lot was levied upon June 4, 1883, and sold October 4th thereafter. The sale and conveyances down to plaintiff were regular. The defendant, Ragsdale, claimed under a deed from Weber and wife, acknowledged by the wife September 4, 1883. She and her family resided on the lot until September 11, 1883. Ragsdale was her son-in-law, and knew all the facts. The premises being in fact the residence of the family at the levy, and the parties, Weber and wife, having conveyed to defendant by the forms of law, there was no injustice done by the verdict and judgment.

Finding no error, the judgment below is affirmed.

HOMESTEAD — ABANDONMENT. — Homestead is not lost by a temporary removal therefrom: *McDermott v. Kernan*, 72 Wis. 268; 7 Am. St. Rep. 864, and note 866; *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767, and note. Abandonment of a homestead cannot be accomplished by mere intention to abandon, unaccompanied by actual discontinuance of the use of the premises: *Archibald v. Jacobs*, 69 Tex. 248. Compare *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554; *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767, and note.

HOMESTEAD — CREDITORS' RIGHTS. — The homestead right when fixed is an estate in land, and a creditor has no right to it as a security: *Hargadene v. Whitfield*, 71 Tex. 482. The conveyance of a homestead by a husband and wife in due form of law is no fraud on a creditor of the husband, because such creditor has no right whatever in such homestead: *Butler v. Nelson*, 72 Iowa, 732.

WHITE v. STRIBLING.

[71 TEXAS, 103.]

EXEMPT PROPERTY — DAMAGES NOT RECOVERABLE FOR SEIZURE OF, WHEN.

— The plaintiff in a suit is not liable in damages for the seizure and sale, by the officer to whom the writ is delivered, of property exempt from execution, where there is no evidence to show that the plaintiff directed the levy or in any way participated in the seizure, or that he ever received the proceeds of the sale, or in any manner ratified the seizure under the writ. When he places a writ in the hands of an officer for service he is presumed to intend that no action shall be taken thereunder not authorized by its terms.

DISTRESS-WARRANT proceeding. The opinion states the case.

Smith and Walker, for the appellant.

Mathews and Wood, for the appellee.

WALKER, A. J. This is an appeal from a judgment for fifty dollars actual and two hundred and forty dollars punitive damages rendered in favor of Stribling against White and one Philips, a constable, for the seizure and sale under distress-warrant proceedings of certain articles of household property exempt from execution. By appropriate allegations exemplary damages were asked against both the defendants.

The record shows that White made the statutory affidavit and bond for a distress-warrant; that such warrant issued, and under it Philips seized the alleged articles. They were not removed from the house at levy, but were left in charge of a joint occupant with Stribling. At the levy Stribling told Philips the goods were exempt. The goods were necessary for the comfort of the family. Stribling made no defense. White appeared by attorney. Judgment was rendered for amount claimed and order for sale, and sale followed. There is nothing in the statement of facts showing any participation in the seizure and sale by White, or, indeed, his appearance after making the bond.

The court charged the jury touching White's liability: "Even though you may believe Philips is guilty of the alleged seizure and sale of said property, yet you cannot find any damages against defendant White unless, from all the facts and circumstances in evidence before you, you are satisfied that the defendant White directed or instigated said Philips in the seizure of said property, and further, that such direction and instigation by White, if any, was done willfully and oppressively, knowing that said property was exempt." This, evidently, is correct as to the claim for exemplary damages.

The rules given in section 273, *Freeman on Executions*, is: "When the plaintiff places his execution in the hands of an officer for service he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ. The sheriff may seize the property of a stranger or do any other unauthorized act without thereby creating any liability against the plaintiff, because the plaintiff is not presumed to have directed or ratified the illegal proceeding. But this presumption may be rebutted." Noting conflict of decisions, the author proceeds on ratification: "In the United States the adoption of the official trespass makes the persons adopting it liable to the same extent as if originally participants therein. This adoption may be made in express terms, or it may be

inferred from the fact that the plaintiff, with knowledge of the fact, directs the continued holding of the property, or attends and bids at the sale, or receives and retains the proceeds thereof," knowing the illegality of the seizure. See also *Alsop v. Jordan*, 69 Tex. 300; *Longcope v. Bruce*, 44 Id. 438; *Erwin v. Bowman*, 51 Id. 518; Moak's *Underhill on Torts*, 561.

The record in this case shows that White sued out the distress-warrant. This he had a legal right to do. The proceedings were regular. The distress-warrant contemplated levy upon property exempt from execution. There is no testimony that White directed the levy, or in any way participated in the seizure. It does not appear that he ever knew what property was seized. He appeared by attorney on the trial when the judgment in the justice's court was rendered. Nor is it shown that he ever received the proceeds of the sale. There is no fact in evidence tending to show any knowledge of or ratification of the seizure of exempt property under the writ. The judgment, at least to the extent of exemplary damage, was wholly without testimony as to the appellant White; for which cause the judgment below is reversed and cause remanded.

EXECUTIONS—LIABILITY OF THE EXECUTION PLAINTIFF.—The plaintiff in execution is equally liable with the officer for abuse of process by the latter, if he commands or advises such abuse: *Snydacker v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551. Execution creditors are liable for an illegal seizure although they did not authorize the sheriff to seize the property in question: *Duperron v. Van Wickle*, 4 Rob. (La.) 39; 39 Am. Dec. 509, which is contrary to the rule laid down in the principal case.

MOODY & Co. v. CARROLL.

[71 TEXAS, 143.]

LAW BECOMES PART OF DEED OF ASSIGNMENT FOR BENEFIT OF CREDITORS when it is made, and will control the assignee in the management and distribution of the estate, even though some of the terms of the deed may be at variance with the law.

OMISSION IN ASSIGNMENT FOR BENEFIT OF FIRM CREDITORS TO PROVIDE FOR CREDITORS OF INDIVIDUAL MEMBERS of the firm does not avoid the assignment. The individual creditors are included by the law, and can enforce their rights against the assignee without disturbing the assignment.

PROVISION AUTHORIZING ASSIGNEE FOR BENEFIT OF CREDITORS TO SELL ON CREDIT does not invalidate the assignment. The creditors may compel the assignee to sell on credit or for cash, as the best interests of all concerned may demand.

ASSIGNMENT FOR BENEFIT OF CREDITORS IS NOT VITIATED BY FRAUDULENT CONVEYANCE MADE BY ASSIGNOR in contemplation of the assignment or at the time it was made. Such conveyance may be set aside by the assignee or by a creditor.

DIRECTION TO PAY COSTS AND EXPENSES BEFORE CREDITORS does not invalidate an assignment for the benefit of creditors; the law provides that these shall be first paid.

DIRECTION TO PAY TO OTHER CREDITORS, PRO RATA, BALANCE remaining in the hands of the assignee after discharging the debts of the accepting creditors will not render the assignment void. The power thus attempted to be given to the assignee by the deed is void, but it will be his duty to execute the trust according to law, ignoring the illegal power conferred upon him.

PROVISION REQUIRING ASSIGNEE TO RETURN TO ASSIGNOR RESIDUE OF ESTATE after the debts of every kind have been paid or satisfied does not invalidate an assignment for the benefit of creditors; such a provision merely requires the assignee to do what the law requires him to do.

GARNISHMENT, ASSIGNEE FOR BENEFIT OF CREDITORS NOT SUBJECT TO. — No creditor can, by attachment or garnishment, take any part of an estate, held by an assignee for the benefit of creditors under a valid assignment, out of his hands, and apply it to the payment of his debt. But after the trust has been fully executed, if there be any excess, non-accepting creditors may have it applied by garnishment; and if garnishment proceedings have been commenced, they should be allowed to stand, so as to secure to the garnishor any precedent rights he may have.

APPEAL. The opinion states the case.

Owsley and Walker, for the appellants.

COLLARD, J. The principal question for determination in this case is, Is the assignment made by Fain, Peery, and Shelton to J. A. Carroll, for the benefit of creditors, void on its face? It is a general assignment of all partnership and individual property of every kind for the benefit of all creditors of the firm, providing for such creditors as accept under it, requiring bond of assignee, and in all its provisions indicating that the intention was to assign under the statute.

When such an assignment is made it comes under the statute, and must be executed in the manner provided by the statute, even though some of its terms may be at variance with the law. The law becomes part of the deed, and will control the assignee in the distribution and management of the estate. He becomes an officer of the law, and must be governed by it under direction of the court: *Fant v. Elsbury*, 68 Tex. 6; *Schoolher v. Hutchins*, 66 Id. 328, 329. The creditors can compel the assignee to conduct the administration as the law provides, and can maintain their rights in the courts, whether the instrument of assignment designates them or not.

It does not appear that there were any creditors of the individual members of the firm; but if there were, we do not understand the law would require us to hold the assignment void. They would be included by the law, and could enforce their rights, whatever they might be, by suit against the assignee, without disturbing the assignment or having it declared illegal.

It is contended that the assignment is void because it provides that the assignee is authorized to sell the property on a credit. If any clause in the deed could be so construed, it would not for that reason be held void. The creditors can compel the assignee to administer the estate for the best interest of all concerned.

The question was before the supreme court in *Keller v. Smalley and Harris*, 63 Tex. 516. Justice Stayton, in that case, said: "Cases may arise in which, for many reasons, sales on a credit would best subserve the interests of all, and in such case the creditors could compel the assignee so to sell; and, on the other hand, cases may arise in which it would be to the advantage of creditors that the property should be sold for cash, and in such case the assignee, who might desire or intend to sell on a credit, could be compelled to sell for cash. The rules by which the validity of assignments not statutory are to be determined have not conclusive application to assignments made under the statutes."

The court referred to the amended act of 1883 as authority for the decision in which it is declared "that no fraudulent act, intent, or purpose of the assignor or assignee shall have the effect to defeat the assignment or deprive the creditors consenting thereto from the benefits thereof, but any such fraudulent act, intent, or purpose on the part of the assignee shall be sufficient for his removal."

The foregoing amendment contains only the principles that were announced in 1882 by the supreme court in the case of *Blum v. Welborne*, 58 Tex. 162, 163, where it is held that no act of the assignor or assignee, or of both, at the time the assignment is made, or preceding it, but in contemplation of it, done with intent to defeat, delay, or defraud creditors, will authorize a creditor to treat the assignment as void, etc. The amended act of 1883 (sixth section) is then only declaratory of the law as it was before. We are not called upon to add any additional argument for holding that an assignment conferring the power upon the assignee to sell

the property on a credit will not render the assignment void. It is settled by the authorities referred to. The estate will be managed according to the best interests of the creditors, regardless of the directions given in the assignment: *Schoolher v. Hutchins*, 66 Id. 329. It has also been decided that property fraudulently conveyed, or debts fraudulently secured and preferred in contemplation of insolvency, will not vitiate the assignment: *Blum v. Welborne*, *supra*. The statute itself is explicit upon the question. It provides that all property conveyed or transferred by the assignor previous to or in contemplation of insolvency, with intent or design to defeat, delay, or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment. The assignee, or in case of his neglect or refusal, any creditor of the estate, may sue and recover the property and subject it to the assignment. This statute needs no interpretation; it is full authority for holding that any attempt on the part of Fain, Peery, and Shelton to prefer creditors by sale of property or deeds of trust in contemplation of assignment, or at the time it was made, would not vitiate the assignment. The sales and preferences so made would be void if the beneficiaries knew of the fraudulent intent, or had reason to believe it: See section 9 of the act in relation to assignments, Gen. Laws 1879, p. 59. No injury could result to the creditors. They could set aside such preferences by suit.

It is claimed that the assignment is void because it directs the assignee to pay first all expenses, rents, taxes, and assessments due and to become due on lands until sold. The law would require the assignee to pay all expenses of the execution of the trust, and all taxes due and to become due upon the property while it is in his hands; also the rents to become due for such time. These matters are costs, and must be first paid. The rents due would be a preferred claim upon the rented property, and if properly probated, would have to be first paid after costs and expenses out of the proceeds of the property rented. The direction as to payment of such rents would not necessarily be void. As to such claim the assignee would be governed by the law of rent liens, the probate of the claim, and the time in which it was probated. The language of Chief Justice Stayton in *Schoolher v. Hutchins*, 66 Tex. 329, is here applicable. He says: "If, however, the deed of assignment attempted to confer powers which, under the law, an assignee could not legally exercise in the execution of that

trust, this would not be sufficient reason for holding the assignment invalid. When an assignment is made under the statute the rights of creditors vest, and they can compel the assignee to exercise the powers which the law expressly or by implication confers upon him, as they can restrain him if he attempts to exercise powers which the law does not confer upon him.

The same may be said of the direction in the deed to pay any balance that may be in the hands of the assignee after discharging the debts of accepting creditors to other creditors *pro rata*. The assignee cannot execute such power; the law makes the excess subject to garnishment: Section 8 of the act of 1879. The power expressed in the deed is void, and cannot be enforced; it will be so treated without rendering the whole assignment void. It will be the duty of the assignee to execute the trust according to the law, ignoring the illegal power conferred upon him.

It is also claimed by appellants that the deed is void because it requires the residue of the estate after all debts of every kind have been paid or satisfied to be returned to the assignors. This only directs the assignee to do what the law requires him to do. It reserves no benefit to the assignors to the detriment of the creditors. It is not fraudulent, and cannot affect the execution of the deed of assignment.

We have reviewed every objection to the assignment that need be noticed, and our conclusion is that it is not void, and there was no error in the court's so holding. Such being the case, no creditor could by process of attachment or garnishment take the assigned estate, or any part of it, out of the hands of the assignee, and compel its application to the payment of his debt. After the trust has been fully executed, if there should be any excess, non-accepting creditors may have it applied by garnishment. Until then they cannot interfere with the assignment proceedings. The answer of the assignee was sufficient to entitle him to a discharge from any claim of the garnishors until the trust was fully executed according to law; but the garnishment proceeding should be allowed to stand until accepting creditors are satisfied or paid, and so give the garnishors any precedent rights they may have over other garnishments against any fund or property that may remain in the hands of the assignee after he has executed the trust, and an order should be entered to that effect: *Lovenberg v. Bank*, 67 Tex. 440. This, however, was not the object of the

garnishment or of this appeal, and hence we conclude the appellants should pay the costs of this appeal, the costs of the court below, and the two hundred dollars accorded the garnishee as compensation to be included as costs: R. S. 219.

The judgment of the lower court is reformed and affirmed accordingly.

FOR NOTE RESPECTING THE LAW AS TO ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, see *Turnipseed v. Schaefer*, 2 Am. St. Rep. 24-26.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — Clauses in the deed permitting sales upon credit: See monographic note to *Nicholson v. Leavitt*, 57 Am. Dec. 505, 506; *Kellogg v. Muller*, 68 Tex. 182.

PREFERRED CREDITORS. — Where a deed of assignment purports upon its face to convey to the assignee all of the assignor's property for the benefit of all his creditors, and certain creditors are preferred therein, the provisional preference is void; yet the deed will be upheld otherwise as a valid assignment: *Griebbs v. King*, 117 Ind. 243. The fact that an assignor has withheld a part of the assigned property and appropriated it to the payment of a particular creditor will not invalidate the assignment, since the title to the property passes to the assignee: *Loomis v. Stewart*, 75 Iowa, 387. Compare *Ray v. Hiller*, 11 Col. 445. For a failing or insolvent debtor to prefer one of his creditors is not necessarily fraudulent or unlawful, unless it is done by a voluntary assignment for the benefit of creditors, or within sixty days prior to the making of such an assignment: *Landauer v. Victor*, 69 Wis. 434. Compare *Grocery Co. v. Records*, 40 Kan. 119.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. — Every instrument purporting to be a general assignment for the benefit of creditors is governed as to its force and effect and execution by the statute regulating assignments for the benefit of creditors; and when the deed making such a general assignment is executed, the assignee becomes the officer of the law to administer the trust in obedience to the law, regardless of any direction in the deed violative of its provisions: *Fant v. Elsbury*, 68 Tex. 1. In Iowa there is no statute depriving a debtor of the right of making a partial common-law assignment of his property for the benefit of his creditors: *Loomis v. Stewart*, 75 Iowa, 387.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS — FRAUD. — In order to set aside a deed of assignment, there must not only be a fraudulent intent on the part of the assignor, but also a participation by the assignee in such fraudulent intent: *Ferral v. Farnes*, 67 Md. 76; *State v. Adler*, 97 Mo. 413.

PEARSON v. COX.

[71 TEXAS, 246.]

DEED BY INSANE HUSBAND, OF HOMESTEAD, perfect in form, and executed by him and his wife, is voidable only, but not void; and if the wife seek to avoid it, she must pay back the consideration received thereunder.

WHERE COURT DECREES REPAYMENT OF CONSIDERATION RECEIVED UNDER DEED, upon rescinding a conveyance, it should order a sale of the property, after a reasonable time, for the purpose of raising the money found to be due.

SUIT for rescission. The opinion states the case.

W. W. Wilkins and Richard B. Semple, for the plaintiffs in error.

WALKER, A. J. March 24, 1884, M. M. Ussery and her husband, J. G. Ussery, brought suit against Cox to recover 280 acres of land alleged to have been the homestead of plaintiff, and for the value of certain personal property appropriated by Cox. Pending the suit, the husband died, and the widow married David Pearson. The suit was revived in name of M. M. Pearson and her five minor children, the heirs of J. G. Ussery, it being alleged that there was no administration, and facts showing no need of one. David Pearson, the husband, refusing to join with his wife as plaintiff, he was made defendant.

The pleadings showed that Ussery and wife had occupied the land as their homestead; that November 29, 1883, while they were thus occupying the land, and in possession of a large amount of stock cattle, milch cows, provender, etc., Ussery sold said land and personal property to Cox; that Ussery at the time was of unsound mind, and that Cox knew it, and, taking advantage of his condition, induced him to sell at a largely inadequate price; that Mrs. Ussery was coerced into signing the deed; that Ussery, dying, left five children, all minors, and plaintiffs "offer to perform whatever may be required of them in the premises by the order and decree of the court, and here tender any moneys necessary for that purpose." Prayer that the said contract for sale be rescinded, etc., and said deed be canceled and held for naught, for possession, rents, damages, etc. Defendant, Cox, answered by demurrer and special exceptions, general denial, and that plaintiffs had received the proceeds of the sale, and with the money had purchased another homestead.

The charge of the court complained of is as follows: "If J.

G. Ussery and his wife had their homestead upon the land described in the petition, and if his wife did not willingly sign the deed and acknowledge the same, but signed under coercion of her husband, . . . and if defendant knew of such coercion, or had the means of knowing it; and if you further find that the wife never abandoned or relinquished her right to said homestead,—then you will find for the plaintiffs (the widow and children) two hundred acres of said land so as to include the residence and other improvements; and as to the remainder of the property, if you find that J. G. Ussery was insane (as before explained) at the time of the trade, but defendant did not know of such insanity, and did not make the purchase to defraud Ussery, then you will find for all the plaintiffs the remainder of the land and the value of the personal property, as before explained, but that the defendant recover the amount of the purchase-money paid by him for such property outside of the homestead,—stating the amount in your verdict.”

After some deliberation, the jury submitted the inquiry to the judge: “If the jury find that J. G. Ussery was insane at the time of the sale, and also find that coercion was used by the husband unknown to defendant, will the jury be compelled to set aside the two hundred acres as a homestead solely on the fact that he was insane, and coercion was unknown to defendant?”

The reply was: “I instruct you that in the case named, if the wife and children received the benefit of the money realized from the sale of the homestead, you cannot find the homestead for them, but should make your finding under the general charge; but if she or the children did not receive the benefit of such purchase-money, then you should find for them a homestead in the case named.”

The verdict was: “That J. G. Ussery, at the time he made the deed to defendant and transferred the personal property to him, was insane, so that he was not competent to contract at that time; that defendant, Cox, bought the land and personal property in good faith, without knowing of such insanity, and paid the purchase-money of the same. We find a verdict for plaintiffs for the land described in the petition, and, in addition, \$799.78 as cash value for the personal property. We find for defendant two thousand five hundred dollars, the amount of purchase-money paid by him for the land and personal property.”

Upon this verdict, a decree was rendered that plaintiff recover the land, and have writ of possession, provided that at any time within six months from this date (August 20, 1886) plaintiffs pay to the clerk of the court, for use of defendant, Cox, the sum of \$1,700.22, being the difference between the amount found for plaintiffs and the amount paid by Cox for the land; upon failure, plaintiffs to be barred from having writ of possession, and title to rest absolutely in the defendant.

It is evident that the verdict was in response to the charge last given, and at the request of the jury, and that, taken in connection with the charge, it is a finding that the plaintiffs had received the benefits of the money received from the sale of the homestead. This was not without testimony nor pleadings. The defendant had in his answer pleaded that with the purchase-money the deceased had provided for the plaintiffs a new homestead. The testimony showed a purchase by the deceased of a town lot in Sherman at eight hundred dollars, and five hundred dollars expense in placing a house thereon, with the further outlay of money for furniture; that the deceased had given his wife seven hundred dollars in money, and at his death she had received the further sum of three hundred dollars from a bank deposit. The receipt of these benefits having been shown, the effect of it, whatever it may be, would be the same, whatever disposition may have been made of them, whether on hand to be paid on the equities of the defendant, or if spent, it was through no fault of defendant.

In finding that the plaintiff had received the money equivalent to the homestead, following the instruction, they ignored the claim of homestead rights asserted by the plaintiff; and this finding, without distinction between the homestead and the other property, is the only complaint against the verdict.

If this issue and verdict did no injustice to the plaintiffs, then the verdict as rendered should be sustained, whatever irregularities may appear in the record.

The court had charged that if the homestead had not been abandoned or relinquished, then, upon insanity being found as a fact, the homestead rights were intact, and that the homestead of two hundred acres, with improvements, should be found for the plaintiffs; but as to the other land and the personal property, while plaintiffs could recover it, they should refund to Cox his money paid for it. This is the theory of the rights of the plaintiff insisted on in the appeal.

In avoiding a deed for property other than the homestead, at suit of the heirs of the maker, and against a purchaser innocent of the fact of the insanity of the maker, and without fraud, the decree would provide for repayment of the money paid by such innocent party. This is the inflexible rule. He that seeks equity must do equity. The exception, if it be one, must arise from the nature of the homestead claimed, or rather, from the laws protecting it to the family, and from the supposed improvidence of the husband.

If while the husband is insane the wife cannot dispose of the community property by her independent act, it is urged by appellants that her act is not aided by the concurrent act of the lunatic husband, and that as a consequence, as to the homestead, the conveyance to Cox was a nullity, and that from it no equities could arise. It is also urged by appellants that such is the logical deduction from the cases of *Heidenheimer v. Thomas*, 63 Tex. 287, and *Berry v. Donley*, 26 Id. 746. In *Heidenheimer v. Thomas*, *supra*, there were no equities to adjust upon the rescission, the deed having been obtained for an antecedent debt. In *Berry v. Donley*, *supra*, the certificate of the privy acknowledgment was wanting in material parts, and the wife was not bound by it. The deed, as to her, had no effect, was a nullity, and a decree rescinding it was not necessary.

Our courts have held that "the deed of an insane person is not void, but only voidable": *Elston v. Jasper*, 45 Tex. 413. "A contract is void when it is without any legal effect; voidable, when it has some effect, but is liable to be made void by one of the parties, or by a third person": Bishop on Contracts, sec. 611. As the deed to Cox was perfect in form,—executed by both parties, with the privy acknowledgment of the wife,—the title in him would be good unless avoided by the parties, or by judicial process. The defect was from no act, omission, or incapacity of the wife, but it arose when the insanity of the husband was established in the suit to avoid the contract. To rescind a contract, which is but another term for avoiding it, the rule is, "that the one proceeding to rescind must either give back or offer to return whatever of value was received under the contract": Bishop on Contracts, sec. 679. This rule is recognized by appellants in the petition, as it asks that the contract be rescinded,—offering to do and to pay what the court, on hearing, should order.

The widow, as such, as to the homestead, had nothing in

law to complain of. She had duly acknowledged the deed for it; she had little equity, for she and her children had received the benefits of the sale. As legal representatives of the deceased, they were entitled to insist upon their right to reclaim the land. This right must be exercised subject to the equities of the transaction; yet it exists, regardless of the fairness of the sale or of the adequacy or inadequacy of the price received. The equities of the purchaser demand that compensation be made him as well for the homestead as for the other property. The right to compensation as against the entire tract, as determined in the decree, was only an application of the ordinary rules followed in proceedings for rescission of contracts. This does no wrong to the complainants, for they have the price, to be returned; it restores to Cox his money when he loses the land.

We conclude, therefore, that in avoiding the contract with Cox, he was entitled to have his money, as well for the homestead as for the other property. The verdict, therefore, worked no injustice to appellants. The decree, however, should have ordered sale of the land upon failure to pay the \$1,700.22 into court.

The judgment below is reversed, and is here rendered as below, save that if plaintiffs fail within six months to deposit said sum with the clerk for benefit of defendant, then order of sale issue for the sale of said land to satisfy said judgment and costs of sale.

INSANE PERSONS — DEEDS. — Deeds by insane persons as grantors are voidable, not void: *Riggan v. Green*, 80 N. C. 236; 30 Am. Rep. 77; *Eaton v. Eaton*, 37 N. J. L. 108; 18 Am. Rep. 716; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705; *Hovey v. Chase*, 52 Me. 304; 83 Am. Dec. 514; *Allis v. Billings*, 6 Met. 415; 39 Am. Dec. 744. Where a conveyance is made by an insane grantor prior to his being adjudged insane, for a fair and reasonable consideration, the grantee being ignorant of the grantor's insanity, and having taken no undue advantage of him, the conveyance cannot be avoided unless the consideration has been returned, or an offer made to return it: *Cribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233. An insane grantor whose condition of mind was known to the grantee, and who has not ratified the conveyance at sane intervals, may avoid the conveyance without restitution, or an offer to do so: *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766; note to *Gibson v. Soper*, 66 Am. Dec. 421.

AYCOCK v. KIMBROUGH.

[71 TEXAS, 830.]

PAROL PARTITION OF LANDS AMONG JOINT TENANTS OR TENANTS IN COMMON is not within either the statute of frauds or the statute regulating the transfer of the real estate of married women.

PARTY FAILING TO SHOW ANY INTEREST IN LANDS PARTITIONED CANNOT COMPLAIN of any error in the proceedings by which such lands are partitioned.

PAROL PARTITION IS NOT AFFECTED BY REGISTRATION LAWS, and after such partition is made, the levy of an execution upon lands allotted to others than the defendant in execution will not affect the rights of those to whom the partition was made.

DISTRICT COURTS HAVE AUTHORITY, IN CIVIL CASES, TO SET ASIDE ALL ORDERS, judgments, and decrees of the term; and the setting aside of such orders, judgments, and decrees cannot estop the parties thereto from again litigating the questions involved.

SUIT for injunction and partition. Henry Morris died intestate in August, 1877, leaving as his heirs Mrs. Perkins, Mrs. Price, and Mrs. Kimbrough, all married, and two sons, A. P. and J. R. Morris. The deceased left two town lots, upon one of which he had his homestead, and one hundred acres of land in the country. In November, 1873, appellant recovered a judgment against A. P. Morris, under which an execution was issued and levied on November 20, 1878, on the interest of A. P. Morris in said one hundred acres of land. Suit was filed by Mrs. Perkins, Mrs. Price, and Mrs. Kimbrough, joined by their husbands, against the sheriff, the Aycocks, and A. P. Morris. The plaintiffs, claiming to be sole owners of the land, prayed that the sale of the land be enjoined, and that they be quieted in their title. A temporary injunction was granted, but was afterwards dissolved, and the land was sold under said execution to Aycock, who took a deed for the benefit of his wife to one undivided one-fourth interest in the land. Aycock and wife then filed a cross-bill in said injunction suit, setting up their title, and praying for a partition and to be quieted in their title. In January term, 1885, judgment was rendered giving Aycock and wife one undivided one-fourth interest in the land, and appointing a commissioner to divide it. On the next day, attorneys appeared, for the first time, for A. P. Morris, and moved in his behalf to set aside the judgment. The court, which had not adjourned for the term, granted the motion. At the July term following, a second trial resulted in a judgment for the appellees, quieting them in their title and possession. The court found the fol-

lowing special issues of fact: 1. That A. P. Morris had been a married man and the head of a family since 1867, and had resided on the lot described in his answer before 1877, and continued to reside thereon with his family until 1880, when he sold it. 2. Soon after the death of Henry Morris, in 1877, it was verbally agreed among the heirs of Henry Morris that A. P. Morris should have the house and lot described in his answer, being an acre of land in Marlin, that Mrs. Kimbrough, Mrs. Perkins, and J. R. Morris should have the one hundred acres of land, and Mrs. Price the other town lot. 4. That on October 9, 1879, persons selected by the parties partitioned said property in writing, as had been before verbally agreed upon. 5. That each claimed the land as agreed on from the date of the parol partition. 6. Mrs. Kimbrough and Mrs. Perkins have been all the time married women. 8. That on the 18th of December, 1877, the heirs of Henry Morris conveyed said one-hundred-acre tract to J. R. Morris, and the same day J. R. Morris executed to W. H. Kimbrough a power of attorney to sell said land, and divide the proceeds equally between A. P. Morris, and Mrs. Kimbrough, Mrs. Perkins, and Mrs. Price; the deed and power being duly recorded a few days after execution. 9. That the persons who made the written partition of Henry Morris's estate in 1879 charged A. P. Morris two hundred dollars for rent of the house allotted to him. 10. That Kimbrough, in 1883, sold the one hundred acres of land under the power of attorney, and the proceeds, as far as collected, have been paid to Mrs. Kimbrough, Mrs. Perkins, and J. R. Morris. None have been paid to A. P. Morris. 11. That the judgment rendered at the January term in favor of Aycock and wife was set aside, on the motion of A. P. Morris, at the same term of the court, and that he had filed no pleading in the cause until after the rendition of said judgment. 12. The verbal partition was valid, and the land not subject to the execution.

Emma Aycock and B. L. Aycock, pro se.

Goodrich and Clarkson, for the appellees.

MALTBIE, J. It is insisted that the court erred in not sustaining Aycock's general demurrer to the defendant A. P. Morris's answer,—said answer asserting that the one hundred acres of land had been allotted to Mrs. Perkins, Kimbrough, and Price in a parol partition of George Morris's estate among his heirs in the year 1877, the two former being married

women. It has been long settled that a parol partition of lands among joint owners or tenants in common is not within the statute of frauds: *Houston v. Sneed*, 15 Tex. 309; *George v. Thomas*, 16 Id. 89; 68 Am. Dec. 612; *Stuart v. Baker*, 17 Tex. 419. That some of the parties to the petition are married women is not believed to be a valid objection to such partition, or at all events, that it would not be void and subject to a collateral attack on that account. Married women, it is true, can only convey their real estate in the way pointed out by the statute; but a partition of lands is neither within the statute of frauds nor the statute regulating the transfer of real estate of a married women,—a parol partition being a division, but in no sense a conveyance, of lands, and only vesting the equitable title of the respective shares in the tenants to whom allotted; the legal title remaining as before the partition, but held in trust for the benefit of those holding the equitable interest. There was no error in overruling the demurrer. It is claimed that there was error in the judgment of the court partitioning the lands belonging to George Morris's estate among his heirs, on account of the contradictory allegations in the petition of plaintiffs and the answer of the defendant A. P. Morris,—the petition alleging a partition by mutual deeds in 1878, and the answer alleging a parol partition in 1877. It not being apparent that said decree, if erroneous, could affect appellants,—it having been determined in this suit that they had no interest in the land partitioned,—we are of opinion that they cannot be heard to complain.

It is next asserted that the court erred in not finding that the suit, as against appellants, was collusive and fraudulent, and brought and conducted to defeat the collection of their debt. If there was a parol partition of the land in the year 1877, in which the one-hundred-acre tract was allotted to the sisters of A. P. Morris, said partition being prior to the levy of appellants' execution on the twentieth day of November, 1878, their title, being equitable, and not within the operation of the registration laws, was not subject to levy and sale under appellants' execution; and there could be no fraud in resisting appellants' attempt to subject their land to the payment of A. P. Morris's debt. The court found that the partition was made in 1877, as claimed, and that there was a written partition in 1879 confirming the verbal partition, which the court in this case again approved and confirmed; and there being sufficient evidence to authorize the finding, though there may

have also been circumstances calculated to throw suspicion upon some of the evidence upon which the finding was predicated, under repeated decisions of the supreme court the finding will not be disturbed, there being nothing in the record inconsistent with its truth.

The last complaint is, that "the court erred in not holding the defendant A. P. Morris and the plaintiffs estopped by the judgment rendered at the January term, 1885, against the plaintiffs and in favor of appellants, plaintiffs having abandoned the suit before the rendition of said judgment, and the judgment having been set aside solely on the motion of A. P. Morris, he never having before that time appeared in the case, and the attorneys that had before that time represented the plaintiffs then appearing for A. P. Morris; and that A. P. Morris, having been silent for six years, should not then be permitted to come into court and reopen the case upon a new issue." It was no doubt a very great irregularity for the court to permit A. P. Morris to appear under the circumstances of the case, and favorably entertain his motion for a new trial. Why it was done the record fails to disclose. But it is undoubtedly the law in Texas that district courts in civil matters have authority to set aside all orders, judgments, and decrees of the term, when made either with or without a motion.

Having this complete authority over its records, the setting aside judgments or the granting of new trials, whether rightfully or not, cannot estop the parties thereto from again litigating the question involved, nor could the action of the court in an appeal be held to be error, as no judgment can be appealed from unless it is final.

There being no error in the record of which appellants can complain, we are of opinion that the judgment should be affirmed.

PAROL PARTITION. — Parol partition, followed by exclusive possession and acts of ownership by co-tenants, is binding upon them and their heirs: *Nave v. Smith*, 95 Mo. 596; 6 Am. St. Rep. 79; *Wood v. Fleet*, 36 N. Y. 499; 93 Am. Dec. 528, and note; *Tomlin v. Hilyard*, 43 Ill. 300; 92 Am. Dec. 118, and monographic note thereto on the subject of parol partition; *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735; *Brown v. Wheeler*, 17 Conn. 345; 44 Am. Dec. 550; *Ryers v. Wheeler*, 25 Wend. 434; 37 Am. Dec. 243; *Calhoun v. Hays*, 8 Watts & S. 127; 42 Am. Dec. 275; *McMahan v. McMahan*, 13 Pa. St. 376; 53 Am. Dec. 481; *Hardy v. Summers*, 10 Gill & J. 316; 32 Am. Dec. 167; *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 139. Parol partition may be valid, notwithstanding the statute of frauds: *Haughabaugh v. Howard*, 3 Brev. 97; 5 Am. Dec. 548; *Ebert v. Wood*, 1 Binn. 216; 2 Am. Dec. 436;

contra, Porter v. Perkins, 5 Mass. 233; 4 Am. Dec. 52. A parol partition of land is valid when a wife, having an interest in the land, gave her consent in a written instrument, joined by her husband, to a partition thereof, accepted the land allotted to her, and clearly manifested by her acts an intention not to avoid the partition; and the fact that the written instrument was not signed in the manner regulating the conveyance of the property of married women was immaterial: *Wardlow v. Miller*, 69 Tex. 395. Where there is a parol agreement by tenants in common for partition, which is so far carried into effect that the parties take possession of the several shares allotted to them, or that one of the parties, with the knowledge and consent of the other, goes into exclusive possession of the share set off to him, making thereon valuable improvements, such partition is valid and enforceable unless infected with fraud: *Bruce v. Osgood*, 113 Ind. 360.

MISSOURI PACIFIC RAILWAY CO. v. McELYEA.

[71 TEXAS, 386.]

FAILURE TO GIVE STRICTLY CORRECT CHARGE TO JURY IS NOT GROUND FOR REVERSAL of a judgment, where the court has already presented to the jury the law of the case, clearly and fully, upon all the points to which the refused charge relates.

RAILWAY COMPANY CANNOT RELIEVE ITSELF FROM LIABILITY FOR INJURY TO EMPLOYEE, resulting from a failure on its part, through its agents, actually to use such care for the safety of employees as the law makes it necessary for such a master to use, by making and enforcing regulations, unless the regulations be such, and their enforcement so complete, as to result in the actual use of due care.

RAILWAY COMPANY IS LIABLE TO EMPLOYEE WHO SUFFERS INJURY from the failure of its agents, authorized to do what it is bound to do to avoid liability, to perform their duty, although it make regulations requiring the most rigid and frequent inspections of its machinery, road-bed, and equipments, and the most prompt and complete repair of any ascertained defect, and, for the failure of its agents to comply with any of these regulations, make and enforce an absolute rule that a failure to rigidly comply therewith will be followed by the immediate discharge of the delinquent and forfeiture of wages earned, or other penalty.

ACTION for personal injuries. The opinion states the case.

John Young Gooch, for the appellant.

W. Q. Reeves, for the appellee.

STAYTON, C. J. The appellee was a "section-boss" in the employment of the appellant company, and with the men under his control was being transported on an engine and tender from the section-house to a place on the road at which a wreck had occurred, when the engine and tender were derailed and the appellee thereby seriously injured.

The evidence tends to show that the derailment was caused by a brake-shoe falling from the brake-beam just in advance of a car-wheel, which was thereby forced from the track. The evidence further tends to show that had the brake-shoe been properly fastened it could not have fallen, and that its fastening is so made as to render any defect therein easily observed. It is claimed that the engine and tender were inspected but a short time before the accident, and that they were both then in good order; but there is evidence showing that on that inspection, machinery, constantly in sight of the engineer who made the inspection, was not seen by him to be out of order, though a material part of it was missing.

There was other evidence introduced tending to show that the engine was otherwise out of order, and was considered dangerous, and that it had left the track on several occasions but a short time before.

It is urged that the evidence was not sufficient to sustain the verdict. There was much evidence, consisting mainly of statements that the engine and tender were in good order, and that they were frequently inspected, but all this was for the consideration of the jury; and, in view of the direct proof of defects such as caused the accident, and of the patent character of the defect proved, we cannot say that the conclusion of the jury is not well sustained by the evidence, involving as it does the declarations that the machinery was defective, that the accident resulted from the defect, and that the exercise of that care required of the appellant for the safety of its employees would have prevented the accident.

It is urged that the court erred in refusing to give a charge asked by the appellant. The charge requested was as follows:—

“The defendant was under obligation to the plaintiff to use reasonable care to provide and maintain in proper condition a safe and suitable engine, road-bed, and other appointments, and is liable to him for an injury resulting from defects which were known to the company, or which were discoverable by reasonable care. But if the company exercised reasonable care by making and enforcing suitable regulations which would ordinarily keep the machinery, road-bed, and appointments in safe and proper condition, it is not liable for an injury resulting from defects in either. It does not warrant their completeness, nor warrant against defects, but it is bound to use only reasonable efforts to try to discover and repair

defects. If it does this, it is not liable for a failure to discover or repair an unknown defect."

The court below very carefully and correctly instructed the jury as to the degree of care necessary to be used by railway companies in the conduct of their business, and then proceeded to charge the jury as follows: "If you find, from the evidence, that the engine or tender, or both, upon which the plaintiff was riding when hurt, was out of repair and defective, and that such condition resulted from a failure of the defendant to use the care hereinbefore defined as incumbent upon it, or that it was such that the defendant, by the exercise of proper care, ought to have discovered and remedied it; and that, as the proximate result of the defective condition of the engine and tender, or either of them, plaintiff sustained the injuries of which he complains, — then plaintiff is entitled to recover; but if neither the engine nor tender was defective, then plaintiff cannot recover, though they may have run off the track and hurt him; and, again, if the engine or tender, or both, were defective, but if such defect was not the result of a want of proper care on the part of defendant, and if it was not such as the exercise of proper care by defendant would have discovered and remedied, then, also, defendant would not be liable."

The charge of the court presented the law of the case clearly and fully upon all the points to which the refused charge related, and if it had been strictly correct, the failure to give it would not be ground for reversal. The charge asked, however, would have relieved the appellant from liability if it exercised reasonable care in a named particular, i. e., in making and enforcing regulations which would ordinarily keep the machinery, road-bed, and appointments in safe and proper condition. A railway company cannot relieve itself from liability for an injury to an employee resulting from a failure on its part, through its agents, actually to use such care for the safety of employees as the law makes it necessary for such a master to use by making and enforcing regulations, unless the regulations be such and their enforcement so complete as to result in the actual use of due care.

Such a master may make rules and regulations for the conduct of its business and agents, who are in law deemed its representatives, as will ordinarily secure faithful service for such agents, and yet be responsible to an employee for injury

resulting from a failure of such agent actually to use the care the law requires of the master.

It may make regulations requiring the most rigid and frequent inspections of its machinery, road-bed, and equipments, and the most prompt and complete repair of any ascertained defect, and for a failure of its agents to comply with such regulations, may make and enforce an absolute rule that a failure rigidly to comply with any of these regulations will be followed by the immediate discharge of the delinquent and forfeiture of wages earned, or other penalty, and these regulations may be sufficient, if rigidly enforced, to secure ordinarily a faithful performance of duty; but if, notwithstanding such regulations and their enforcement, the agent, authorized to do what the master must do to avoid liability, fails to discharge his duty, then the master is liable to an employee who suffers injury through such neglect.

The court did not err in refusing to give the charge requested.

There is no error in the proceeding that led to the judgment, and it will be affirmed.

REFUSAL OF INSTRUCTIONS. — Where instructions already given cover the entire case, and properly submit the law of the case to the jury, it is not error to refuse to give others, though they may state the law correctly: *Virginia M. R. R. Co. v. White*, 84 Va. 498; *post*, p. 000.

MASTER AND SERVANT — NEGLIGENCE TO SERVANT. — Where an engineer on a railway train was killed by an explosion of the locomotive, resulting from its unsafe condition and want of repairs, the railway company was liable, although it employed competent superintendent of repairs and master-mechanics, and made proper regulations, and the negligence was not his, but that of the mechanics directed to do the repairing: *Fuller v. Jewett*, 80 N. Y. 46; 36 Am. Rep. 575.

MASTER AND SERVANT — RULES AND REGULATIONS. — It is the duty of the master to use diligence and care, not only in furnishing the machinery, which must be reasonably safe, and skillful employees, but also in making and promulgating rules, which, if faithfully observed, will give reasonable protection to all the servants: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844; *Abel v. Delaware etc. Canal Co.*, 103 N. Y. 581; 57 Am. Rep. 773.

MASTER AND SERVANT. — The master cannot evade his liability to his servant by delegating his duty and its performance to others: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844, and note 850.

McILHENNY COMPANY v. TODD.

[71 TEXAS, 400.]

ASSIGNEE FOR BENEFIT OF CREDITORS CANNOT DIVEST HIMSELF OF HIS FIDUCIARY CHARACTER nor relieve himself of responsibility as assignee by abandoning the trust estate, nor by conveying it to another.

STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF ASSIGNEE FOR BENEFIT OF CREDITORS until relieved, removed, or discharged by order of the proper court, as against a creditor of the assignor who has shown himself entitled to the benefits of the assignment.

ASSIGNEE FOR BENEFIT OF CREDITORS MAY BE REMOVED BY DISTRICT COURT in the exercise of its general equity jurisdiction, upon the application of one or more of the creditors. And the right to make application for such removal is not in any way dependent upon the amount of the claim due to the creditor making the application.

DISTRICT COURT HAS JURISDICTION OF SUIT TO COMPEL ASSIGNEE FOR BENEFIT OF CREDITORS TO ACCOUNT and to obtain a judgment establishing the extent of his liability to the trust estate, without regard to the amount claimed by the party instituting such suit.

PLAINTIFF WILL BE PRESUMED, AS AGAINST GENERAL DEMURRER, TO HAVE FILED STATEMENT and affidavit required by the statute, where in his petition for the removal of an assignee for the benefit of creditors he alleges that he accepted under the assignment, and that the assignee had made payments on his claim. The assignee will not be presumed to have paid funds of a trust estate to one not entitled to receive them.

PETITION for removal of assignee. The opinion states the case.

Marshall, Fulton, and J. D. Bridges, for the appellant.

No appearance for appellees

ACKER, P. J. There being no appearance here for appellees, we regard appellant's brief as a proper presentation of the case: Rule 40, Supreme Court Rules.

Appellant brought this suit August 31, 1886, against appellees G. W. Todd, Henry H. Todd, Louis Bream, and D. Doole. The petition alleges that on the 24th of August, 1880, G. W. Todd, being then indebted to appellants in the sum of \$463.07, made an assignment of all his property, except such as was exempt from forced sale, for the benefit of such of his creditors as would consent to accept their proportional share of his estate and discharge him; that by the deed of assignment, Henry H. Todd and Louis Bream were appointed assignees; that the assignees qualified, took possession of the estate, and began the execution of the trust; that the property belonging to the estate of the value of about \$18,000 was received by the assignees Todd and Bream; that appellant was named in the

list of creditors attached to the deed of assignment, said list showing the indebtedness of the assignor to be about \$10,000; that the assignees executed bond as such in the sum of \$1,000, with D. Doole and H. Nicholas as sureties; that appellant accepted under the assignment, and received from the assignees the following amounts, which were credited on his claim: April 11, 1881, \$18.36; September 26, 1881, \$54; that on the tenth day of August, 1882, Henry H. Todd, as assignee, conveyed by deed to G. W. Todd, the assignor, all of the real estate conveyed to the assignees, together with all of the personal assets belonging to the assigned estate which had not been collected or disposed of by the assignees, which deed was afterward, on the thirtieth day of January, 1886, signed and acknowledged by the other assignee, Louis Bream; that this deed is fraudulent, without consideration, and void; that the assignees have abandoned the trust, and have not, since the tenth day of August, 1882, exercised any control over the assets of the assigned estate; that the assignees have never made any report of the property that came into their hands, nor any report of the disposition they made of the same; that the assignees failed to distribute the assets of the estate among the creditors thereof; that of the personal property and notes and accounts that came into their hands, the assignees by sale and collections realized the sum of twelve thousand dollars; that appellant's account has never been paid, except the credits mentioned; that Nicholas, one of the sureties on the assignees' bond, is a non-resident of the state, and is insolvent.

The prayer is for the removal of the assignees, and appointment of others to execute the trust, for the cancellation of the deed made by the assignees to the assignor; that the property be sold and the creditors' claims paid, and in the event it should appear that the property of the estate has been sold by the assignee, and the proceeds received by them, then for judgment against the assignees and their bondsmen for the amount due appellant and other creditors to the extent of money in the hands of the assignees; for one thousand dollars attorney's fee to be taxed as cost. And in the event the appellant should be mistaken in the relief sought, or asked for the wrong relief, or not sufficient relief, then for such relief as appellant and other creditors may be entitled to.

To this petition appellees answered by general demurrer, special exception setting up the statute of limitation, and exception and plea to the jurisdiction of the court, upon the

ground that appellant's claim was not sufficient in amount to give the court jurisdiction,—all of which were sustained by the court, and judgment entered dismissing the suit.

The correctness of this judgment is questioned by appellant, and the question is presented here by proper assignments of error.

The prayer of the petition is very comprehensive, and seeks a variety of relief. But relief cannot be granted upon the prayer beyond what is authorized by the allegations of the petition. Under a prayer like this, the court could have granted such relief as the case made by the allegations of the petition demanded, and refused to grant so much of the relief prayed for as was not authorized by the petition.

It is obvious that the primary object of the suit was the removal of the assignees, and the appointment of others to perform the trust in the interest of all creditors who had accepted the benefit of the assignment and shown themselves entitled to participate in the distribution of the assigned estate. It appears from the allegations of the petition that the assignees were not only guilty of the most flagrant laches, but also guilty of willful perversion of the trust, and misapplication of the trust estate.

Upon the execution of the deed of assignment, the title to all property owned by the assignor not exempt from forced sale passed from the assignor, and upon the qualification of the assignees, it vested in them for the purposes of the trust. In accepting the trust, they assumed to execute it according to the terms and conditions prescribed by law governing the administration of an insolvent's estate in the hands of assignee. By the provisions of that law, they are required to collect the assets, convert them into money, and to distribute the money ratably amongst such creditors of the assignor as have, in compliance with the requirements of law, proven themselves entitled to receive it. Having done this, it then devolves upon the assignees to make their report to the proper court showing assets received by them, and the disposition made of assets so received. If this report is satisfactory to the court, and is approved, the assignees are then in condition to ask, and are entitled to receive, their discharge. They cannot divest themselves of their fiduciary character, nor relieve themselves of responsibility as assignees by abandoning the trust estate, nor by conveying it to another. Until they are relieved of the position and consequent responsibilities of as-

signees by resignation, removal, or discharge by order of the proper court, the statute of limitation does not run in their favor as against a creditor of the assignor who has shown himself entitled, under the provisions of the statute, to the benefits of the assignment.

Section 14 of the act of 1879, in relation to assignments for the benefit of creditors (Gen. Laws, 60), provides that "if any assignee becomes unsuitable to perform the trust, refuses or neglects so to do, or mismanages the property, the county judge or judge of the district court may, upon the application of the assignor or one or more of the creditors, upon reasonable notice to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and in case of vacancy, by death or otherwise, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee."

This statute expressly gives the right to "one or more" of the creditors to make the application for the removal of the assignee; and the statute does not make the right in any way dependent upon the amount of the claim due to the creditor making the application.

It was held by this court, in *Blum v. Wettermark*, 56 Tex. 80, that the district court, under its general equity jurisdiction, has the power to remove an assignee and appoint another to execute the trust. Such proceeding inures to the benefit of all creditors interested in the assigned estate, and we are unable to discover any reason in support of a rule of law that would limit the exercise of this jurisdiction to cases in which the claim of the creditor making the application is for an amount within the jurisdiction of the court, in suits where jurisdiction is dependent upon the amount.

The statute of limitation was interposed in behalf of all of the appellees, and was sustained as to all of them. In so far as the suit was an application for the removal of the assignees and the appointment of others, we have determined that neither limitation nor the plea to the jurisdiction was available. Under the facts stated in the petition, the court might have entered judgment removing the assignees, appointing others, and canceling the conveyance made by the assignees to the assignor, the title to the property vesting by operation of law in the new assignees. If the assignees had had the right to convey the trust estate to the assignor, their power to convey was joint, and the deed by one of them could not operate as a convey-

ance of the title: *Hart v. Rust*, 46 Tex. 574. There was, therefore, no limitation nor want of jurisdiction as to the appellee G. W. Todd.

In so far as it is sought to recover judgment against the assignees and the surety on their bond, the prayer is for judgment for the amounts due all creditors entitled to distribution under the assignment to the extent of money withheld or misapplied by the assignees. This judgment is asked only in the event that it should appear that the assignees held funds which such creditors were entitled to have applied to the payment of their claims. In this particular, the purpose of the suit was to compel the assignees to account, and to obtain a judgment establishing the extent of their liability to the trust estate; and we think the district court had jurisdiction to hear and determine such a suit, without regard to the amount claimed by appellant: *Wynne v. Hardware Co.*, 67 Tex. 42. Such a judgment might have been rendered in favor of appellant for the use of itself and other creditors, directing that the proceeds arising therefrom be deposited in the court, to be distributed in compliance with the terms and conditions of the assignment and the provisions of the statute. The equity jurisdiction of the court having been invoked for the purpose of compelling the performance of the trust, for the benefit of all consenting creditors, the prayer being in the alternative, we think the court had the power to grant the necessary relief, either by removing the original assignees and appointing others in their stead, upon whom the duty would then devolve of protecting the assets, and enforcing the rights of the trust estate against the original assignees; or, by compelling an account, rendering judgment for the amount, and directing the distribution to be made under its supervision and control.

It is not in terms alleged in the petition that appellant had filed with the assignees a statement of the nature and amount of its claim, as required by section 7 of the statute, but there is no special exception to the petition upon this ground. It is alleged in the petition that "appellant accepted under the assignment," and that the assignees made two payments on its claim. As against a general demurrer, the presumption must be indulged that the assignees did not pay the funds of the trust estate to a person not entitled to receive them, and that appellant not only consented to the assignment, as required by section 5 of the statute, but filed the statement and affidavit, as required by section 7, and thereby became an accept-

ing creditor, entitled to participate in the distribution of the assets of the estate.

For the errors indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. — Creditors may compel the execution of the trust by the assignee: Note to *Gibson v. Chedic*, 90 Am. Dec. 507. The assignee cannot, after accepting the conveyance, divest himself of the legal estate by merely refusing to carry the trust into execution: *Seal v. Duffy*, 4 Pa. St. 274; 45 Am. Dec. 691; note to *Skipwith v. Cunningham*, 31 Am. Dec. 657.

MISSOURI PACIFIC RAILWAY COMPANY v. IVY.

[71 TEXAS, 409.]

PERSON SENT IN CHARGE OF LIVE-STOCK ON RAILWAY TRAIN IS EMPLOYEE OF OWNER of the stock, and not of the railway company, notwithstanding the fact that by an agreement indorsed on the contract under which the stock is carried he agrees that he is the employee of the company. The true relations of the parties cannot be changed by such a contract, which is but a subterfuge upon which to predicate the discharge of the company from liability for damages.

LIABILITY OF COMMON CARRIER CANNOT BE LIMITED UPON FALSE OR COUNTERFEITTED RELATIONS in a case where it cannot be done in express terms and by a direct agreement.

PERSON SENT IN CHARGE OF LIVE-STOCK ON RAILWAY TRAIN IS PASSENGER for hire. The consideration for his passage is to be found in the services he renders in caring for the stock, or in the charges made for shipping the stock. And the railway company owes him the same duties of care that it owes to any other passenger upon a freight train.

COMMON CARRIER CANNOT ABSOLVE HIMSELF FROM OR LIMIT HIS LIABILITY FOR HIS OWN NEGLIGENCE or the negligence of his servants.

RAILWAY COMPANY IS LIABLE FOR ITS OWN NEGLIGENCE, OR THAT OF ITS SERVANTS, resulting in personal injury to a person traveling in charge of live-stock on its train, and if such person be killed through such negligence, it will be liable to his wife, children, and father.

RES GESTÆ, STATEMENTS NOT ADMISSIBLE AS PART OF, WHEN. — Statements made by by-standers an hour or two after a railroad disaster as to the cause of and the circumstances attending the accident are not admissible in evidence as part of the *res gestæ*.

OBJECTION GOING TO MANNER AND FORM OF TAKING DEPOSITION MUST BE MADE BEFORE TRIAL, and notice given to the opposite party; otherwise, the deposition cannot be excluded when offered in evidence on the trial.

ACTION to recover for injuries causing death. The opinion states the case.

R. C. Foster and A. E. Wilkinson, for the appellants.

Harris and Saunders, for the appellees.

COLLARD, J. It is insisted by the appellant, the Missouri Pacific Railway Company, that Ivy, the deceased, at the time of the collision of trains causing his death, was an employee of the company, and that such being the case, the company would not be liable to his heirs if his death was the result of negligence on the part of his fellow-servants. This point is made in several different assignments, and is ingeniously presented by counsel for the company.

One J. P. Higgins shipped cattle on defendant's road from Fort Worth to the stock-yards in East St. Louis, under a contract. There is an agreement indorsed on the back of the contract, and signed by Ivy, as follows: "We, the undersigned persons in charge of the live-stock mentioned in the within contract, in consideration of the free pass granted us by the Missouri Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations at the head thereof and those printed on the back thereof, all of which, for the consideration aforesaid, are hereby accepted by us, and made a part of this our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time that we are in charge of said stock, and while we are on our return passage, we shall be deemed employees of said company for the purposes in said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment; and that said company shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employees."

The first question presented to us by the record, then, is, Was Ivy in fact an employee of the company at the time of his death? The regulations referred to in the foregoing agreement have this provision: —

"For the purposes of taking care of the stock, the owner or men in charge . . . will be passed on the train with it, and all persons thus passed are at their own risk of any personal danger whatever, and will sign an agreement to that effect indorsed on the contract."

Looking at the contract itself, we see that it states that the rates charged for the shipping of the cattle are declared to be lower than the usual rates, and in consideration thereof there are many stipulations by the shipper, releasing the company from damages for losses and injury to the stock, and limiting

its liability as a common carrier. It also contains, substantially, the following stipulation by the owner: —

"3. At his own risk and expense, he is to take care of, feed, water, and attend to the stock while in the stock-yards awaiting shipment, while being loaded, transported, unloaded, and reloaded; he is to unload and reload at feeding and transfer points and at destination, and is to hold the company harmless for any and all loss and damages to the stock while so in his charge and cared for by him, or his agents or employees.

"5. When the company shall furnish for the accommodation of the owner laborers to assist in loading or unloading the stock, they shall be subject to the owner's orders, and deemed his employees while so engaged, for whose acts he agrees to hold the company harmless.

"8. The contract forbids the holder, or any other person, to ride on any train, except for the purposes and in accordance with the rules and printed instructions printed on the back of it, all of which are accepted as a part of it.

"10. The persons in charge of the stock shall remain in the caboose while the train is in motion," etc.

It is impossible for us to say, from the stipulations in the foregoing contract and regulations, that Ivy was in the employ of the company. It is clear to us that the contract and regulations contemplated he was to be in the employ of the owner or shipper. He went along in charge of the cattle, to care for them, feed and water them, load and unload them, all of which the owner, by the terms of the contract, was to do at his own expense and risk. So careful is the contract to include every stipulation that would relieve the company from responsibility for the cattle while in transit that a clause is inserted making laborers furnished by the company to aid in attending to the stock the employees of the shipper and subject to his orders. We do not intend to say the company would be acquitted from its ordinary responsibility as common carrier of the stock by the various provisions of the contract to that effect; but we do infer from the terms and requirements that the person sent in charge of the stock had charge of them for the owner, under his employ as agent and representative. It seems to us it could not be seriously contended that he was in the employ of the company. He started from Lampasas to attend to the cattle on the way. They were first shipped on the Gulf, Colorado, and Santa Fé railway to Fort Worth, and there reshipped on defendant's road. Ivy signed the agreement indorsed on the

back of the contract as the person provided for in the contract or regulations who should attend the cattle in transport for the owner. All the facts go to show that he was in the employ of the owner. It would be absurd to suppose otherwise.

By the agreement indorsed on the back of the contract, he agrees that he is the employee of the company, but that is evidently a fiction to provide for the release of the company from damages for personal injuries occasioned by the negligence of its servants. It is a pretense, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relations of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so. It amounts to this: Knowing that a contract would be of doubtful validity that absolved the company or limited its liability as a common carrier of passengers, the contract was devised in which the passenger acknowledges himself to be an employee of the company, so as to contract for its limited liability upon such relation, and give it the semblance of legality. If the liability of a common carrier cannot be limited in express terms, and by a direct agreement, it cannot be done upon false or counterfeited relations.

Ivy was a passenger on defendant's train,—a passenger for hire. It is attempted to make it appear that he passed free of charge for his own accommodation, or for the accommodation of his employer, the owner of the cargo. The consideration for his passage is found in the services he renders in taking care of the cattle,—a duty the law devolves upon the carrier; or it is found in the charges made for shipping the cattle. The question then arises, Can a common carrier absolve itself from liability, or limit its liability for damages, for its own negligence or the negligence of its servants? This question has been decided adversely to the appellant by our own supreme court. In the case of *Gulf, Colorado, & S. F. R. R. v. McGown*, 65 Tex. 643, Mr. Justice Stayton decided that a free pass to a passenger, with a stipulation indorsed that the holder assumed all risks of accidents to his person, without claim for damages upon the corporation, was a contract, and that it was illegal and contrary to public policy. We quote some of the language of the opinion, as authority for our guidance in the case. He says: "In the nature of things, the negligence of the agent of whatever grade as to matters within the scope of his employ-

ment with reference to passengers is the negligence of the corporation itself, which, all the American cases agree, fixes a liability which the carrier cannot be permitted to avoid by contract." "We are further of the opinion," he says, "that a railway company cannot by contract lay down its public character as a common carrier of passengers which the law as well as the nature of the employment fixes upon it, and become a private carrier." We need not go on and quote further from the opinion, — which is quite exhaustive in argument as well as in citation of authorities. It is sufficient for us that the law is by that opinion well established in this state, that without a statute to that end a common carrier cannot limit its liability by contract against the negligence of its servants, or its own negligence. In the opinion the court cites approvingly the case of *Railroad v. Lockwood*, 17 Wall. 357, in which the opinion was delivered by Justice Bradley. Justice Stayton makes free extracts from the case in support of his views, and commends the opinion as one of admirable clearness and fullness.

The Lockwood case was very similar to the one at bar. It was concerning the liability of a common carrier upon a drover's pass, in which it was agreed that the company should be held harmless for personal injury to himself or whomsoever went with the cattle. The drover was to go along with his cattle, to load and unload them, assuming all risk of injury to them or of personal injury to himself. The acceptance of the pass was to be considered a waiver of all claims for damages received on the train. After a comprehensive discussion of the question and a careful review of the authorities, both in America and England, Justice Bradley declares such contracts are in contravention of public policy, and reaches the following conclusions: "1. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; 2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servant; 3. That the rules apply both to common carriers of goods and carriers of passengers for hire, and with special force to the latter; 4. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

It would be useless for us to amplify the arguments and

reasoning in the two cases above cited,—one from our supreme court and the other from the supreme court of the United States. We are content to follow those cases and adopt their conclusions without further discussion or elaboration of the doctrine. We believe it is and ought to be settled law, that a common carrier cannot, by contract, exempt itself from liability for injuries and damages resulting from its own negligence or the negligence of its servants. The public have an interest in the contract which a private individual cannot waive. If such liability could be avoided by contract, there would at once be an end to the liability altogether.

Our conclusions are, that we are to look to the real relations of the carrier and passenger, regardless of any fiction or pretense of agreement, and then to apply the law to declare the liabilities arising from the actual relations of the parties, as the law and public policy demand.

Ivy was a passenger for hire on defendant's train, and defendant owed him the same duties of care that would have been due to any other passenger upon a freight train. Ivy assumed the risk incident to such mode of travel,—that is, the increased risk of riding on a freight as distinguished from a passenger train,—but defendant would certainly be liable to him for its own negligence or the negligence of its servants, resulting in personal injury; and it would be liable to his wife, children, and father, if his death resulted from the gross negligence of its servants. We deem it unnecessary to comment upon the charges of the court objected to, or the charges asked by defendant and refused by the court, as the views herein expressed are sufficient to explain what, in our opinion, is the law of the case.

After defendant's testimony was concluded, Espey, a witness for plaintiff, was recalled by plaintiff, and asked: "What, if anything, did you hear any of the employees of defendant say, at the time of the collision or immediately thereafter, in reference to when or how the front train broke in two?" Defendant's witness had testified that the train had broken in two, and left the caboose and one other car behind, which had stopped before the collision occurred. Plaintiff's witness Espey, who was in the caboose with Ivy at the time he was killed, had testified that the caboose had never stopped, but was moving when the collision took place. The evidence was material, as tending to show that Ivy had or had not time to get off the caboose before the collision. Defendant's counsel

objected to the question, because the declarations sought did not appear to be a part of the *res gestæ*, but were hearsay, and could not be used to impeach defendant's witnesses, because no predicate had been laid for their impeachment. Plaintiff's counsel then stated that the evidence was offered as *res gestæ*. The objections were overruled, defendant excepting. The witness then answered: "I heard it stated on the ground that night that the collision was the cause of the breaking or uncoupling of the train. I can't tell who said it,—parties standing around the camp-fire there, railroad men and others. This was within an hour or two after the wreck. I don't know whether Conductor Torply was present. It was talked over about the fire, and some of the conductors, brakemen, and engineers were present. I heard it also asserted that the train had broken in two before the collision, and denied by others. Some of the farmers from the neighborhood had gathered there, and there was talk about hanging the engineer. He said he reversed his engine and tried to stop the train, but it did not seem so from the way his engine kept grinding into the front train." The defendant then moved to exclude the testimony, for the same reasons urged in the objection to the question. The court refused to exclude, and defendant again excepted.

We do not think the evidence was admissible. It was not a part of the *res gestæ*. A statement of what parties said so long after the transaction could not be a part of the transaction: *Gulf etc. R'y v. Moore*, 69 Tex. 157. In a suit on a policy of insurance, where the insured property was destroyed by fire, a witness for the defendant was permitted, over objection of plaintiff, to state, "There was some talk of arresting all the clerks that night for complicity in the fire," etc., the supreme court of this state declared, "The evidence was but a statement of what persons said who were present at the fire, which, under no rule of law, was admissible": *Dwyer v. Continental Ins. Co.*, 63 Id. 356.

It was error to admit the evidence objected to in this case. The statements of by-standers were not admissible in any event, nor were the statements of employees of the company, made as mere narrations of past events. The talk among the farmers about hanging the engineer was not evidence at all, and was well calculated to prejudice the jury against the defendant.

We also hold that there was error in excluding the answer

of Torply to the ninth cross-interrogatory, as set out in defendant's bill of exceptions. It is true, the answer volunteered to state facts in addition to the matter inquired about, but it was evidence tending in some degree to show that Ivy may have been warned in time to have avoided the danger by the exercise of proper care. It may have had influence with the jury, though it was positively denied by Espey, who was with him at the time. Under the rule, as we understand it, as laid down in *Lea & Co. v. Stowe*, 57 Tex. 449, the objection goes to the manner and form of taking the depositions, and should have been made before the trial, and notice given to defendant. If notice had been given before the trial of the objection, the irresponsible part of the answer should have been stricken out.

We are of opinion that on account of the errors of the court in admitting and excluding evidence as here pointed out, the judgment of the court below ought to be reversed, and the cause remanded for a new trial.

CARRIER CANNOT LIMIT ITS LIABILITY for the consequences of its own negligence: *Merchants' D. T. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847, and note 864; *Pennsylvania R. R. Co. v. Raiordan*, 119 Pa. St. 577; 4 Am. St. Rep. 670, and note 673. The general rule of absolute liability of carriers for the safe transportation and delivery of property committed to it for carriage is applicable, although the property consists of live-stock, but subject to the exception that it is not an insurer against injuries resulting from the inherent nature or propensities of the animals themselves, and without fault of the carrier: *Lindsley v. Chicago etc. R'y Co.*, 36 Minn. 539; 1 Am. St. Rep. 692, and note 696, as to the liability of a carrier of live-stock. This rule is also subject to the exception of accidents without fault of the carrier, caused by the act of God: *Gulf etc. R'y Co. v. McCorquodale*, 71 Tex. 41. In the absence of any evidence to the contrary, it is to be assumed that goods accepted by a carrier for carriage are taken under the common-law liability, as modified by statute: *Park v. Preston*, 108 N. Y. 434.

RES GESTÆ, WHAT STATEMENTS ARE AND WHAT STATEMENTS ARE NOT: *Leahey v. Cass Avenue R'y Co.*, 97 Mo. 165; *ante*, p. 300, and cases collected in note thereto.

ST. LOUIS, ARKANSAS, AND TEXAS RAILWAY COMPANY v. MACKIE.

[71 TEXAS, 491.]

IMPROPER ADMISSION OF HEARSAY TESTIMONY IS NOT GROUND FOR REVERSAL of a judgment, when the same fact thereby sought to be established is proved by other evidence admitted without objection and un rebutted.

RAILWAY PASSENGER WHO HAS PAID FIRST-CLASS FARE, BUT RECEIVED SECOND-CLASS TICKET, IS NOT BOUND TO PAY ADDITIONAL FARE as a condition on which he will be permitted to recover damages naturally growing out of a violation of its contract by the company in compelling him to ride in a second-class car, when it has the means of complying with its contract, and knowingly refuses to do so. The company cannot, in such case, be heard to urge in defense of an action for the breach of its contract, either for the purpose of defeating the action or lessening the damages, that the party injured might have secured the performance of the contract, and thereby prevented or lessened the injury by paying an additional compensation to induce it to perform the duty which it had already been fully paid to perform.

RAILWAY COMPANY IS BOUND TO PROTECT SECOND-CLASS PASSENGERS FROM NOXIOUS INFLUENCES not necessarily nor ordinarily incident to such travel, but brought about by the wrongful acts of other passengers, which it might, by the exercise of due care, prevent.

RAILWAY COMPANY IS LIABLE IN DAMAGES TO PASSENGER who, being entitled to passage in first-class cars, is by the conductor of the train expelled from a car of that class wrongfully and in a manner calculated to humiliate and distress him, and compelled to take passage in a car in which the discomforts are greater than in the car in which he was entitled to ride, and to suffer unnecessary annoyances.

ACTION for damages. The opinion states the case.

Clark, Dyer, and Bolinger, for the appellant.

Richardson and Watkins, for the appellee.

STAYTON, C. J. Appellee desiring, with his wife and two children, to go from Athens, Texas, to some place in North Carolina, applied to the appellant's agent at Athens, Texas, for through-tickets to Nashville, Tennessee. Tickets were issued to him, for which he paid the price charged by the company for first-class tickets, but by mistake or otherwise tickets were delivered to him which entitled him and family to travel only in a second-class car.

He did not examine the tickets when they were delivered to him, but on the arrival of the train, with his family entered a first-class car on the appellant's railway. After the train had traveled but a few miles, the conductor called for his tickets, which were produced, when the conductor required

him and family to leave the first-class car and take seats in a second-class car; and while no force was used by the conductor in bringing this about, it was done under circumstances calculated to humiliate and mortify the feelings of the appellee and his wife, who, from the record, appear to have been people of refinement and intelligence.

At the time this was done, and at all other times during the trip when on any of the roads over which the tickets took the appellee and his family the appellee was refused passage in a first-class car, he explained to the conductors the circumstances under which the second-class tickets were delivered to him. The conductors offered to permit the appellee and his family to travel in a first-class car if he would pay one cent per mile on each ticket in addition to what he paid for the tickets. This he refused to do, as appears from his evidence, because he had paid for the tickets a sum that entitled him to first-class tickets, but it is rendered probable by the evidence that he had not money sufficient to pay this demand and pay the other necessary expenses of himself and family until they would reach their destination.

It is alleged that the second-class coaches in which the appellee and his family were compelled to travel from Athens, Texas, to Nashville, Tennessee, were uncomfortable, foul with smoke, dirt, and filth; and filled with negroes and coarse whites, who smoked tobacco, drank whisky, and used violent, profane, and obscene language in the presence of the appellee and his family, in consequence of which, it is alleged, the appellee and his family were greatly humiliated and injured physically and mentally.

It is further alleged that the misconduct of the persons in the cars was open, and that no effort on the part of the officers in charge of trains was made to prevent it. It was further alleged that tobacco-smoke caused nausea to appellee's wife. The matters thus alleged are proved in great detail.

There was a verdict and judgment for seventeen dollars for injuries to the appellee, and for five hundred dollars for injuries to his wife.

On the trial a witness, over the objection of appellant, was permitted to state that a few days after the tickets were sold to appellee he had a conversation with the agent of the appellant at Athens, Texas, in which the latter told him that the price of first-class tickets from Athens, Texas, to Nashville, Tennessee, was \$22.45. This was the price paid by appellee

for each ticket delivered to him, and the objection to the evidence was that it was not *res gestæ*, but hearsay, and therefore inadmissible.

It may be admitted that this objection ought to have been sustained, but if from the record it appears that the proof of the same fact sought to be thus established was made by other evidence admitted without objection and un rebutted, then this ruling furnishes no ground for reversal. The same witness, whose evidence, as above stated, was objected to, was permitted to state, without objection, that the appellant's agent at Athens told him "that there was but one price for tickets sold to Nashville, and that was \$22.45, and that they never sold any but first-class tickets; that no second-class tickets were ever sold to that point." "Chambers (the agent) showed me the stubs of the two tickets which were sold to Mackie and wife, and which they still had in the office, and the stubs showed that they were sold as first-class tickets." The last part of this evidence was brought out by the appellant, and there is no conflict of evidence as to the price paid by appellee, nor as to the price of first-class tickets. In this state of the record, if the court erred in admitting the evidence objected to, — a matter we need not decide, — the ruling was harmless, and furnishes no ground for reversal.

It is urged that, as the appellee might have procured seats in first-class cars by the payment of seventeen dollars in addition to the full price for first-class tickets, which he had already paid, his failure to do so relieves the appellant from liability. A defense of this character was pleaded, and the failure of the court below to submit it to the jury is assigned as error.

The case made by the pleadings and proof is, that appellee made a contract with appellant whereby the latter, for a consideration paid, agreed to transport the appellee and his family in first-class cars on its own and connecting lines from Athens, Texas, to Nashville, Tennessee, which was violated.

The violation of this contract entitled appellee to recover damages, and if it was the duty of appellee to have paid the additional sum demanded, and thereby to have secured the accommodations and services for which he had contracted and paid, then his failure to do so could not defeat his action, but would affect the measure of damages.

The charge asked would have made his failure to pay the additional sum demanded a defense to the entire action, if by

its payment the appellee would have received the services and accommodations he was entitled to receive without such additional payment. A charge leading to such a result was not only misleading, but clearly erroneous, and was properly refused.

The rule invoked by the appellant has been applied in many cases, and is wholesome in its operation in a case in which it is applicable, but we are of the opinion that it ought not to be applied in the case before us.

There is no question of negligence in this branch of the case, the court having carefully submitted to the jury whether the receipt of second-class tickets by appellee without examining them was the exercise of such care as a prudent man would ordinarily have exercised under the circumstances existing when they were received, and the only question is, Does the law, under the facts of this case, impose on a person situated as was the appellee the duty of doing more than his contract requires, as a condition on which he will be permitted to recover damages naturally growing out of a violation of the contract by the other party, who, at the time of its violation, has the means to comply with it, and knowingly refuses to do so?

The appellant made a contract to transport, or to cause to be transported, in a first-class car, the appellee and his family from one named place to another, and for this service received in advance the compensation demanded. This contract was made by an agent, who failed, through mistake, or otherwise, to give the written evidence of it, but it was nevertheless the contract of the appellant, who is charged with knowledge of all the terms of it. Knowing the terms of the contract through another agent, it violated it, and, we may say, did so under circumstances aggravating in their character. Under the regulations made by the appellant and other lines over which the appellee had to pass, it may have been made the duty of conductors to their companies to regard the tickets as the only evidence of the contract to which they could look for the regulation of their conduct, but the law affects the appellant with knowledge of the real contracts made by its agents, and it cannot be permitted to shield itself from liability for the non-performance of a contract on the ground that it had made a regulation which precluded its conductor from making any inquiry as to the real contract made, or from carrying it out. The making and enforcement of such a regulation rather

aggravates than excuses the violation of a contract, for this withdraws from agents operating trains the power to correct a mistake and comply with the contract actually made, although this might be easily done. But for such a regulation the conductor would probably, when informed of the mistake in the tickets, have, as he might have done, ascertained soon after the passage began what the real contract and consequent right of the appellee was.

It cannot be heard to say that it was ignorant of the terms of the contract, of its violation, or of the unauthorized demand made by its agent as a condition on which he would execute the contract. The duty of appellant was fixed by contract based on full consideration paid, and the law recognizes no means whereby it can be more firmly imposed, or compliance with it made more imperative.

It has been said that the rule insisted upon "is simply one of good faith and fair dealing" (*Gilbert v. Kennedy*, 22 Mich. 132); and can it be true, under the facts of this case, that good faith and fair dealing required the appellee to pay a sum in addition to that paid and deemed by appellant a sufficient compensation for the services it had contracted to perform, in order to be entitled to have the contract complied with, or to have damages for any injury resulting from its breach? We think not.

It is not necessary in this case to undertake definitely to determine under what states of fact the rule insisted upon may have application; but we do feel authorized to hold, from an examination of the cases to which we have access, that a party whose duty it is to perform a service necessary to the fulfillment of his contract, and to prevent injury to result from its violation, may in all cases be looked to to fulfill that duty when he has equal knowledge and opportunity; and that he cannot be heard to urge, in defense of an action based on his own breach of contract and consequent violation of duty, either for the purpose of defeating the action or lessening the damages, that the injured party might have secured the performance of the contract, and thereby have prevented or lessened the injury by paying to him an additional compensation to induce him to perform the duty which he had already been fully paid to perform: 1 Sutherland on Damages, 150. This holding affirms the correctness of the action of the court below in refusing to give the instruction asked by the appellant.

It is urged that the evidence did not warrant the verdict for

damages for injuries to the wife of appellee, but we see no reason to doubt its sufficiency.

Had the appellee and his wife been entitled to passage only in a second-class car, we do not understand that the appellant would not have been then compelled to exercise due care to protect them from discomforts resulting from the acts of other passengers, and not incident to the kind of cars used for passengers of that class, whether those discomforts were physical or mental.

A railway company cannot subject passengers, even in a second-class car, to noxious influences not necessarily nor ordinarily incident to such travel, but brought about by the wrongful acts of other passengers, which the company, by the exercise of proper care, and due regard for the welfare of passengers, could prevent without liability for injury resulting from such causes.

The record shows that the wife of appellee was compelled to ride in a car full of tobacco-smoke, which caused to her nausea; that she was compelled to ride where she could not avoid hearing rough, profane, and obscene language, and witness acts of violence and drunkenness.

These things carriers of passengers ought not to permit in vehicles in which they undertake to transport decent men, much less refined and delicate women; and if they do, when they could prevent them by the use of due care, they must respond in damages based on injuries, physical and mental, which, for their measure, must necessarily largely depend on the honest exercise of the judgment and discretion of the court or jury trying the cause.

In the case before us, however, the appellee and his wife were entitled to passage in first-class cars. From a car of that class they were expelled by the conductor on appellant's train, wrongfully, and in a manner calculated to humiliate and distress them. Thus were they compelled to take passage in cars in which the discomforts were greater than in the cars in which they were entitled to ride, and to suffer the unnecessary annoyances to which they seem to have been subjected.

We cannot say that the evidence did not warrant the verdict and judgment, and the judgment will be affirmed.

HARMLESS ERRORS—INSTANCES OF WHAT ARE: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note; *Columbus etc. R'y Co. v. Bridgers*, 86 Ala. 448; 11 Am. St. Rep. 58, and note.

WESTERN UNION TELEGRAPH COMPANY v. COOPER.

[71 TEXAS, 507.]

INJURY TO FEELINGS, CAUSED BY FAILURE TO DELIVER TELEGRAPHIC MESSAGE relating to domestic affairs, is an element of actual damages, where the failure is the result of negligence on the part of the company or its servants.

DAMAGES MAY BE RECOVERED COMMENSURATE WITH INJURY, without reference to the degree of negligence causing it, if the inexcusable negligence of a telegraph company's servants is found to be the proximate cause of the injury.

HUSBAND IS PROPER PARTY TO SUE FOR PERSONAL INJURY TO HIS WIFE, and she is not a necessary party.

DEATH OF CHILD BEFORE BIRTH AND GRIEF OCCASIONED THEREBY TO MOTHER ARE NOT ELEMENTS OF DAMAGE, in an action for personal injuries to a wife. But evidence that the child was still-born may be admitted, if that fact tends to show that her labor was thereby prolonged and her suffering so increased.

HUSBAND CANNOT RECOVER DAMAGES FOR HIS ANXIETY AND SYMPATHY FOR SUFFERING OF WIFE in an action to recover for personal injuries to her. Only the person who suffers the injuries proximately resulting from the wrong done is entitled to compensation in such action.

PHYSICIAN SHOWN TO BE EXPERT MAY GIVE IN EVIDENCE HIS OPINION as to whether a child would have been born alive if medical assistance had been obtained in time.

CORRESPONDENCE BETWEEN TELEGRAPHIC OPERATORS SENDING AND RECEIVING MESSAGE not communicated to the sender is not admissible in evidence for the purpose of showing that the person to whom the message was sent was not at the time in the place to which it was sent.

INFORMATION GIVEN AT OFFICE OF PERSON TO WHOM TELEGRAM IS ADDRESSED to the messenger sent there to deliver it, touching the whereabouts of such person, is admissible in evidence upon the issue of negligence or not on the part of the operator and messenger in failing to deliver the message.

CHARGE TO JURY GIVEN ON HYPOTHESIS NOT JUSTIFIED BY EVIDENCE IS IMPROPER.

IT IS PROPER FOR COURT TO DISTINGUISH BETWEEN SUFFERING ACTUALLY ENDURED and the suffering necessarily incident to confinement, and not resulting from the want of medical attendance, in an action to recover for injuries to a wife from failure of a telegraph company to deliver a message sent to her physician.

IF PHYSICIAN COULD NOT HAVE REACHED PATIENT IN TIME to attend her in confinement, even had there been no negligence on the part of the telegraph company in delivering the message sent to him, no recovery can be had for the pain and suffering resulting to her by reason of the fact that he was not present to aid in the delivery of the child, and a charge presenting this question should be given to the jury.

MERELY TAKING IMPORTANT TELEGRAM TO OFFICE OF PERSON TO WHOM IT IS ADDRESSED does not end the duty of the messenger, where the latter knew the former and his place of residence, which was near by, and the person addressed was well known in the town.

REASONABLE DILIGENCE MUST BE USED TO DELIVER TELEGRAM, and what will constitute such diligence in a particular case will depend upon the circumstances of that case, of which the jury are the exclusive judges.

WHERE PETITION ALLEGES THAT TELEGRAM WAS PROMPTLY TRANSMITTED FROM OFFICE at which it was received, but there is evidence that it was delayed there for a time, the court should charge the jury that they should confine their inquiry to the question of proper care or negligence in delivering the message at the office of delivery.

ACTION to recover damages for the failure to deliver a telegram in these words: "Come at once; bring Laurie; Josephine sick. J. M. Cooper." This telegram was addressed to Dr. J. R. Keating. Josephine was the wife of plaintiff, then about to be confined, and Laurie was the sister of Josephine, and wife of Dr. Keating. The nature of the message was explained to the operator at the time it was sent. On the trial a verdict and judgment was rendered for the plaintiff, and the defendant appealed. Other facts appear from the opinion.

Stemmons and Field, for the appellant.

Crane and Ramsey, for the appellee.

COLLARD, J. Appellant claims that its demurrers to plaintiff's petition should have been sustained, because injury to feelings disconnected from all actual personal injury are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages.

The very question raised here was before the supreme court in the case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, and the court, after discussing the *So Relle* case (*So Relle v. W. U. T. Co.*, 55 Tex. 310; 40 Am. Rep. 805), and the two *Levy* cases (*Gulf etc. R. R. Co. v. Levy*, 59 Tex. 543, 563; 46 Am. Rep. 278), the case of *Hays v. Houston R. R.*, 46 Tex. 272, and other authorities, use the following language: "But it is claimed that the mental is an incident to the bodily pain, and that without the latter the former cannot be considered as actual damages. In cases of bodily injury, the mental suffering is not more directly and naturally the result of the wrongful act than in this case,—not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person."

The conclusion derived from the opinion in the case from which the foregoing extract is taken is, that injury to feelings caused by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damage. The same principle was decided by the commissioner of appeals in the case of *Miller v. G. C. & S. F. R'y* (erroneously styled in the reports *Wilson v. G. C. & S. F. R'y Co.*), 69 Tex. 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury.

2. The husband is the proper party to bring suit for such injuries to his wife. She is not a necessary party: *Texas Central R'y Co. v. Burnett*, 61 Tex. 638; *San Antonio Street R. R. Co. v. Helm*, 64 Id. 147.

3. We do not think the death of the child before birth, and the grief or sorrow occasioned thereby, can be an element of damages in this character of suit. If it is made to appear, from the testimony, that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm on account of her own condition than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering; but the death of the child—the bereavement of the parents and their grief for its loss—cannot be considered as an element of damages. Such damages are too remote; they are the result of a secondary cause, and ought not to be allowed to enter into a verdict. This is not an action under the statute by the parents for the death of a child, and if it were, injury to the feelings of the parents could not be a basis of recovery by them: 3 Wood on Railway Law, 1538, and note 3. Injury to the mother alone, her physical pain and mental suffering because of her own condition, would be a proper consideration, and it would be correct to allow proof that the child was still-born, if such fact tended to show that the labor was thereby prolonged, and her suffering so increased.

4. It is impossible to see upon what principle the husband can claim damages for injury to his feelings. His suffering

could only be from alarm and sympathy for his wife's suffering; his distress is merely a reflection from her distress, and that might be very considerable, but it is too remote and consequential. She is allowed to recover in this suit, or rather he is, under the forms of law, on account of her injuries of body and mind; to allow him damages for the same injuries would be to allow two recoveries upon the same cause of action. We know of no authority that would justify such a conclusion. The person who suffers the injuries proximately resulting from the wrong done, and such person alone, is entitled to compensation, except in cases where death results, and the cause of action is made to survive to the relatives by virtue of a statute. The husband can sue for such injuries to his wife, but he cannot recover on his own account for his anxiety and sympathy.

5. Dr. Cooper, having shown himself competent to testify as an expert, could give his opinion as to whether the child would have been born alive if he had received medical assistance in time. The death of the child was a proper inquiry, if it tended to prolong labor as above explained, notwithstanding there could be no damages for its death and consequent loss of services in this action.

6. The correspondence by wire between the operators sending and receiving the message, not communicated to Dr. Cooper or his wife, would not be legitimate evidence. George S. Stewart, the sending operator, received a telegram from the receiving operator that Dr. Keating had gone to the country. The question and answer were both properly excluded by the court. The fact that Dr. Keating had gone to the country could not be established in this way.

7. Any information the messenger received at the drug-store as to the whereabouts of Dr. Keating, and the communication of such information to the receiving operator at Cleburne, would be admissible upon the issue of negligence or not on the part of the operator and messenger in failing to deliver the message. Hence the messenger ought to have been allowed to state, if he would, that he was told at the drug-store where Dr. Keating kept his office, while attempting to find Keating, that he was gone to the country. There was error in excluding his statement to that effect.

8. The court, in its charge, referred to the operator at Cleburne as the person charged with the duty of delivering the message, and stated that if he "made no effort to deliver"

the same, or "used so little care to deliver it" as to satisfy the jury "that he was indifferent," etc.

The charge is criticised by appellant on the ground that the operator was not required to deliver the message; that this was the duty of the messenger. While we think the objection hypercritical, the charge would have been clearer if the court had merely instructed the jury to the effect that if defendant's servants whose duty it was to deliver the message used so little care, etc. Under the facts of the case, it would not be proper to hypothecate a charge upon the supposition that "no effort" had been made to deliver the message. The message was sent at once by the operator, and the messenger went twice to the office of Dr. Keating with it, and, failing to find him, made no further effort to find him. Whether he was negligent and indifferent in regard to the delivery of the message, and whether there was negligence of the company's operator in failing to perform her duty, were questions for the jury, and should have been left to them, without the supposition that "no effort" had been made to perform such duties.

9. The charge of the court distinguishing the increase of suffering, caused by the non-attendance of Dr. Keating, from the pain she would have suffered if he had attended her, was a correct and necessary distinction. If the servants of the company were, in fact, negligent, and, by reason of such negligence, the pain and suffering of Mrs. Cooper were aggravated and prolonged, she could only recover for such aggravated and prolonged suffering, as distinguished from the suffering she would have encountered in case there had been no such negligence, and Dr. Keating had arrived in time to have waited on her.

10. The court should have given a special charge asked by defendant to the effect that even if there was negligence on the part of defendant's servants in delivering the message, yet if, by the exercise of proper care on their part, it could not have been delivered in time for Dr. Keating to have reached the patient and assisted in the delivery of the child, plaintiff could not recover damages for the pain and suffering claimed. The facts justified the giving of such a charge. It may be a question whether, if the message had been delivered as soon as it could have been by the use of necessary diligence, Dr. Keating could have arrived at Mrs. Cooper's bedside in time to have delivered her. The question should have been submitted to the jury.

11. It was not error to refuse instruction asked by defendant, that "if the messenger went to Dr. Keating's office, and failed to deliver the message because of his absence, and went a second time to his office about noon of the same day, and could not deliver it by reason of Dr. Keating's absence, such facts would excuse defendant from failure to deliver the message, and, in such case, the jury should return a verdict for the defendant for all the damages claimed except the price paid for the telegram." The court correctly refused the charge. Going to Dr. Keating's office was not the extent of the messenger's duty. His residence was close by, he was well known in the town, and the messenger knew him and knew where his residence was. He had been in the country, but had returned before the message was received at the telegraph-office. He says he had left word where he could be found, and that he and his wife were in readiness to attend upon Mrs. Cooper when called, and could have driven there in two hours. The messenger had an important telegram for him, the confinement in labor of a patient, and only called at his office; it certainly would not have been correct, under such circumstances, for the court to have instructed the jury that such effort alone ended the duty of the messenger.

12. Again, the defendant asked the court to instruct the jury "that if a party has a known place of residence and a known place of business in a city, it is no part of defendant's duty to hunt said party up on the streets of the city, and the failure of defendant's messenger to hunt the party on the streets is no evidence of negligence on the part of the defendant."

The court refused the charge. It would have been error if it had been given. The messenger did not go to the residence of Dr. Keating; if he had gone there he might have learned where he was; certainly that he was not in the country. He only went to the office on two occasions,—when the message was received, and then after an interval of two hours. He should have used reasonable diligence to deliver the message, even if that would require him to go upon the streets to find him. What such diligence was would depend upon the circumstances, of which the jury were the exclusive judges.

13. Defendant asked the court to charge the jury as follows: "The plaintiff in his petition states that the message was promptly transmitted from Grandview to Cleburne. There is no question before you as to any delay of the message at Grandview or any other point prior to its reaching Cleburne."

The jury should have been told that there was no complaint or question about delay at Grandview. The petition did allege, as stated in the requested charge, that the message was immediately sent from Grandview, and there was evidence of delay in sending it from that place,—a delay of one half-hour. The charge was upon a material point, and should have been given as to the delay at Grandview.

Other assigned errors not disposed of in the foregoing opinion are, that the court should have granted a new trial because of the insufficiency of the evidence to support the verdict. Of that we do not express any opinion.

For the errors committed and noticed above, we report the case to be reversed, and remanded for a new trial.

WHAT ARE PROPER ELEMENTS OF DAMAGE IN ACTIONS AGAINST TELEGRAPH COMPANIES FOR FAILURE TO SEND OR TO DELIVER MESSAGES. — The rule for measuring damages in actions *ex delicto* is in some respects different from that which is applied in actions arising *ex contractu*. But as actions against telegraph companies, so far at least as the question of damages is concerned, have been almost universally treated as actions *ex contractu*, it will be sufficient for practical purposes to confine our attention to the rules for measuring damages in the latter class of cases. The leading case in England on this subject is *Hadley v. Baxendale*, 9 Ex. 341; and the rules laid down in that case by Baron Alderson, who delivered the opinion of the court, are as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." The doctrine of this case has been very generally accepted as correct, both in England and in this country. The leading American case on the subject is *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, in which Selden, J., delivering the opinion of the court, said: "The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is sub-

ject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed." The cases in which these principles were applied were neither of them telegraph cases. The case of *Hadley v. Baxendale*, *supra*, was an action brought by a shipper against a common carrier, and the case of *Griffin v. Colver*, *supra*, was an action brought by a purchaser against the manufacturer of a steam-engine. But these principles have been very generally applied by the courts in determining questions of damages in telegraph cases. The difficulties that have arisen in determining questions of damages in such cases are not in the principles themselves, but in their application to new and peculiar circumstances, and are largely due to the peculiar nature of the telegraph company's business, and the anomalous character of its relation to the parties with whom its business is conducted.

DAMAGES WHICH ARE NOT THE NATURAL AND PROXIMATE RESULT of the failure of the telegraph company to transmit and deliver a message intrusted to it, and which cannot be considered to have been in the contemplation of the parties to the contract when it was made, cannot be recovered in an action against the company: *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Clay v. Western Union Tel. Co.*, Sup. Ct. Ga., May, 1888; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; *Western Union Tel. Co. v. Crall*, 39 Kan. 580; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *McColl v. Western Union Tel. Co.*, 44 N. Y. Sup. Ct. 487; 7 Abb. N. C. 151; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; 19 Am. Rep. 154; *First Nat. Bank of Barnesville v. Telegraph Co.*, 30 Ohio St. 555; 27 Am. Rep. 485; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; 44 Am. Rep. 620; *Western Union Tel. Co. v. Munford*, Sup. Ct. Tex., Jan., 1889; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *Kinghorne v. Montreal Tel. Co.*, 18 Id. 60. An examination of some of the cases cited above will serve to elucidate the meaning and show the application of the rule stated. In *Western Union Tel. Co. v. Hall*, 124 U. S. 444, the action was brought to recover damages caused by the company's delay in transmitting and delivering this message: "Buy ten thousand if you think it safe." The dispatch related to the purchase of oil, which, on the day on which the message should have been delivered, was selling at \$1.17 per barrel. On the next day the oil advanced to \$1.35 per barrel, and the person to whom the message was sent did not deem it advisable to buy. Nor did he buy at any subsequent date. There was no evidence to show that the sender of the message intended to buy with the object of reselling immediately at a profit, or that he could have sold at a profit at any future time if he had bought. It was held that the price of the message only could be recovered. Mr. Justice Matthews, in delivering the opinion of the court, said: "It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a

profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

In *Western Union Tel. Co. v. Graham*, 1 Col. 230, 9 Am. Rep. 136, an action was brought against the company for negligently failing to deliver this message: "Ship oil as soon as possible, at very best rates you can." Owing to the non-receipt of the dispatch the oil was not sent, and the plaintiff claimed that he lost great gains and profits by the delay caused in the shipping of his oil. The court held that the plaintiff could not recover the profits which he might have made upon the oil, because they could not be fairly considered as having been in the contemplation of the parties to the contract when it was made, but that he was entitled to recover, in addition to the price of the message, the increased price of freight which he was subsequently obliged to pay for transporting the oil, and all other expenses that he was obliged to incur by reason of the company's failure to fulfill its contract. In *Clay v. Western Union Tel. Co.*, 81 Ga. 285, it was held that the profits which the plaintiff might have made if he had received the message sent to him in time to have met the sender of the dispatch at the railway station, and rendered to him the services which he had telegraphed to him to come and perform, could not be recovered by him as damages in an action against the defendant for its failure to seasonably deliver the message. In *Western Union Tel. Co. v. Crall*, 39 Kan. 580, an action was brought to recover damages for the inaccurate transmission by the telegraph company of a message ordering a race-horse of the plaintiff to be sent to a certain place. Owing to the mistake in the telegram, the horse was sent to another place, and could not be entered for the races. It was held that the plaintiff could not recover for the loss of the prize purses which the horse might have won had he been present at the races. In *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, the plaintiff's brokers in New York City, who had previously purchased other railway stocks for him, sent him a telegram to Eminence, Kentucky, where he then lived, informing him that they had bought for him additional railway stocks. This message was never delivered, and he was left in ignorance of the purchase. On the day the stocks were bought, — November 18, 1879, — stocks began to decline, and continued to decline until the 21st of November, known as "black Friday," when it was the greatest. He could have sold on the 19th at a loss of not more than one thousand dollars, and on the 20th at a loss of not more than four thousand dollars. But on the 21st the stock had so far declined that its value, together with the plaintiff's deposit with his brokers, did not equal what they had paid for it, and they thereupon sold it, leaving him in debt to them. By the 28th of November a reaction had occurred, and the stocks were then selling for more than plaintiff had paid for them. He brought his action against the company for damages for its failure to deliver the message, saying that if he had received it he would have kept his "margin" good, and thus saved all his stock. But it was held that he could recover nominal damages only. Holt, J., who delivered the opinion of the court, said: "The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence cannot be supposed to have been in contemplation when the company undertook to transmit it. If the minds of the contracting parties had at the time been drawn to the contingency of a failure of performance, they could not possibly, from the nature of the dispatch, have contemplated the loss of which the appellant now complains; and in such a case, the company is only liable for nominal

damages for its default." In *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154, a man named Brown sent to the plaintiff, Lowery, a message asking him to send him five hundred dollars. The defendant negligently altered the message so as to make it a request for five thousand dollars. Lowery sent the five thousand dollars to Brown, who absconded with the money. Lowery brought an action to recover what he claimed to have lost through defendant's mistake; but it was held that he could not recover. Andrews, J., who delivered the opinion, said: "The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of Brown, conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and if suit had then been brought, the damages would not have been measured by the amount of money sent by the plaintiff. The most that can be said is, that by the negligence of the company an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion."

In *First National Bank of Barnesville v. Telegraph Co.*, 30 Ohio St. 555, 27 Am. Rep. 485, one Lowshe having applied to the plaintiff to have two drafts on parties in New York cashed, it wrote to its correspondent in New York to inquire whether the drawees were responsible, and whether the drafts would be honored. If the parties were not responsible, or if they were unwilling to accept, the correspondent was requested to telegraph, but otherwise not. The plaintiff, not having heard from its correspondent before three o'clock, P. M., on February 15th, cashed the drafts. At 4:55 o'clock, P. M., of the same day the correspondent telegraphed this message: "Parties will accept if bill lading accompanies the draft. Parties stand fair." But the message was never received at Barnesville. The drafts, amounting to three thousand dollars, were never accepted or paid. Lowshe, having obtained the money, went away with it. The plaintiff sued the company to recover the three thousand dollars thus lost by it. It alleged that if it had received the message in a reasonable time after it had been paid to Lowshe, it could have recovered it back from him. And Lowshe himself testified that he would have returned it if he had been informed that the drafts would not be accepted. In deciding the case, the court said: "In any aspect, therefore, in which we are able to view the case, we cannot but consider that the damages are too remote to uphold recovery to any substantial amount." In *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775, the plaintiff telegraphed to his agent at Milwaukee: "Buy 20,000; seller June." This dispatch ought to have been received by nine, A. M., on May 7th, but was never delivered. If the agent had received the message on the 7th he could and would have purchased wheat at \$1.48 per bushel. On the 8th wheat advanced to \$1.55 per bushel, when the agent sold some at that price. On the 8th the agent received a letter from the plaintiff informing him of the sending of the message. From the 8th of May to the end of June wheat fluctuated, and on the last business day in June sold at \$1.23½ per bushel. No purchase was ever made. The plaintiff was held to be entitled to nominal damages only. Cole, J., in delivering the opinion of the court, said: "How can it be said that the loss of profit upon a contract which the agent of the plaintiffs might possibly have entered into, but which he never did, naturally resulted from a failure to deliver the message, or could reasonably be supposed to be within the contemplation of the parties as a

probable result of such failure, when the dispatch was left with the company to be sent over its line? If the agent had received the dispatch so as to make the purchase on the 7th, what presumption is there that he would have resold at a profit? None whatever."

ACTUAL DAMAGES SUSTAINED BY REASON OF FAILURES, DELAYS, OR ERRORS of a telegraph company in transmitting or delivering messages intrusted to it may be recovered by the sender when such damages are the natural and proximate result of the company's default, and may be fairly considered to have been in the contemplation of the parties when the contract was made: *Parks v. Alta California Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Western Union Tel. Co. v. Du Bois*, Sup. Ct. Ill., April, 1889; *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57; *Western Union Tel. Co. v. Harris*, 19 Id. 347; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Hadley v. Western Union Tel. Co.*, 115 Id. 191; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Western Union Tel. Co. v. Longwill*, Sup. Ct. N. M., March, 1889; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263; 4 Am. Rep. 673; *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; affirmed 67 N. Y. 590; *Baldwin v. American Tel. Co.*, 1 Daly, 575; *De Rutte v. New York A. & B. Tel. Co.*, 1 Id. 547; *Mowry v. Western Union Tel. Co.*, 51 Hun, 126; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; *Pepper v. Telegraph Co.*, 87 Id. 554; *Washington & N. O. Tel. Co. v. Hobson*, 15 Gratt. 122; *Lane v. Montreal Tel. Co.*, 7 U. C. C. P. 23. In *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, the plaintiff, in reply to a message from his agent informing him of the failure of a certain firm, and inquiring the amount due from them to him, sent this message: "Due, 1,800; attach if you can find property. Will send note by to-morrow's stage." The message was delayed through the gross neglect of the defendant's agent, and when it reached its destination all the property of the firm had been attached, so that plaintiff's claim was wholly lost. The loss of the debt was held to be the natural and proximate damages resulting from the company's failure to perform its contract. The same principle was applied to similar circumstances in *Baldwin v. American Tel. Co.*, 1 Daly, 575. In *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, the plaintiff delivered to the defendant's agent the following message to be sent to his broker at New York: "Sell one hundred (100) Western Union." As delivered to Wrenn, the broker in New York, it read: "Sell one thousand (1,000) Western Union." Wrenn thereupon sold one thousand shares of the stock of the Western Union, and to replace the nine hundred shares had to buy on a rising market. The difference between the buying and the selling price was \$729.75, and this amount was wholly lost to the plaintiff. This loss was held to be the measure of his damages. Breese, J., in delivering the opinion of the court, said: "If appellants were compelled to and did purchase nine hundred shares of this stock to replace the stock so sold by reason of the carelessness of this company, and if, in the interval between the selling one thousand shares and the repurchase by Wrenn of the nine hundred shares to replace the extra number of shares sold, that stock had advanced in price,

this advance should be the measure of damages. It is reasonable to suppose this is what both parties had in view when the message was committed to the care of appellees." In *Western Union Tel. Co. v. Du Bois*, Sup. Ct. Ill., April, 1889, M. sent through the defendant a message informing the plaintiff that he would sell him apples at \$1.75 per barrel. The company delivered the message, stating \$1.55 as the price per barrel. The plaintiff then ordered the apples, and had to pay the \$1.75 to have them delivered to him. The difference was held to be the measure of his damages. In *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, a telegram was sent to the plaintiff offering him \$150 per month to go on a trip as a steamboat pilot, and for the season if he suited. Through the negligence of the company the message was not delivered until after the boat had sailed, and the plaintiff lost the employment, and failed to get other employment for a considerable time thereafter. The loss of wages thereby sustained was held to be the measure of his damages. In *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57, the plaintiff lost a year's employment through the defendant's negligence in failing to seasonably deliver a message, and it was held that the measure of his damages was the difference between what he would have received and what he actually made during the year. But in *Merrill v. Western Union Tel. Co.*, 78 Me. 97, it was held that where the employment lost through the default of the telegraph company was terminable at the will of either party, nominal damages only could be recovered. In *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, the plaintiff had sold cattle for future delivery, at the option of the purchaser. The latter sent a dispatch informing him that he would take the cattle in the morning of the next day. It was the custom of stock dealers to take the weight of cattle at early daylight. Through the negligence of the telegraph company to promptly deliver the message the weighing of the cattle was delayed, whereby their weight decreased. It was held that the defendant was liable in damages for the loss of weight resulting from its negligence. In *Manville v. Western Union Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8, plaintiff's correspondent sent him this message: "Ship your hogs at once." The delivery of the message was delayed four days by defendant's negligence. It was held that the plaintiff could recover the difference between the market value of the hogs on the day when they would have been delivered had the message been promptly delivered and the market value on the day the plaintiff was able to deliver them after the actual receipt of the message. In delivering the opinion of the court, Miller, J., said: "The market value of hogs in Chicago on any day was capable of being certainly ascertained. If plaintiff had had his hogs in Chicago three days sooner he could have sold them at the then market price. He was prevented from shipping his hogs sooner by the negligence of the defendant's agent. The difference, therefore, between the market value of the hogs on the day plaintiff could have put them on the market if the defendant had been guilty of no negligence in the delivery of the dispatch, and the market price when plaintiff was afterward able to put his hogs into the market, is the measure of damages which may fairly be supposed to have entered into the contemplation of the parties at the time the message was delivered to defendant's operator at Chicago." In *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605, the defendant had contracted to furnish to the plaintiff Chicago market reports. It furnished to him an incorrect report, by reason of which the plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery. It was held that the measure of his damages was the difference between the actual purchase price and the price as represented by the report. In *True v. Inter-*

national Tel. Co., 60 Me. 9, 11 Am. Rep. 156, the plaintiff, in reply to an offer of a cargo of corn, sent this message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered. The price of corn and freight advanced immediately after, and the plaintiff was obliged to buy at the advanced rate. Kent, J., who delivered the opinion of the court, said: "The sum, therefore, which would be compensation for the direct loss and injury sustained by the non-delivery of this message is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise, and the same rule applies to any increase of freight from the sum named, if it be shown that the corn could have been shipped by the sellers at that rate, if the telegram had been duly received." The same principle was applied to substantially similar circumstances in *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157. In *Western Union Tel. Co. v. Longwill*, Sup. Ct. N. M., March, 1889, there was a telegram sent to the plaintiff, a physician, summoning him to go on a professional visit to a patient. Through the defendant's negligence, the message was not delivered until it was too late, and the order had been countermanded. The testimony was that five hundred dollars was a reasonable fee for the services expected to be performed, and that the sender of the message was solvent. It was held that the measure of the plaintiff's damages was the difference between that sum and the amount that he earned during the time he would have been absent on the visit.

In *Sprague v. Western Union Tel. Co.*, 6 Daly, 200, affirmed in 67 N. Y. 590, the plaintiff sent, through the defendant, to an attorney in Buffalo, this message: "Hold my case till Tuesday or Thursday. Please reply." The company never delivered the message, and the plaintiff, receiving no reply, concluded that a postponement of his case could not be obtained. He therefore went with his counsel to Buffalo, where he ascertained that the case had been continued, and in consequence he was compelled to make another trip to Buffalo. It was held that he could recover the expenses of himself and his attorney on the first trip, and also the fee which he was obliged to pay his attorney for making that trip. In *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547, 30 How. Pr. 403, a message was sent to the plaintiff, a commission merchant at San Francisco, ordering him to buy a ship-load of wheat at an extreme limit of twenty-two francs per hectoliter, delivered at Bordeaux. Through defendant's negligence, the message as delivered read twenty-five francs instead of twenty-two francs. Wheat of the kind ordered was then selling at San Francisco at from twenty-four to twenty-five francs per hectoliter, and the plaintiff purchased a cargo at those rates, and chartered a vessel to carry it to Bordeaux. On learning of the mistake in the dispatch, he immediately resold the wheat, and got rid of the charter at a loss of over two thousand dollars. This loss was held to be the direct and immediate consequence of the error in the dispatch, and the correct measure of damages. In *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446, plaintiffs' agents at Chicago sent to the plaintiffs at Oswego this message: "Send five thousand sacks of salt immediately." The company delivered the message, reading "casks" instead of "sacks." The plaintiffs shipped the casks, but there being no market for that kind of salt in Chicago at the time, it sold for less there than it was selling for at Oswego. It was held that the measure of damages was the difference between the market value at Oswego and at

Chicago, together with the cost of transportation from Oswego to Chicago. In *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, the plaintiff sent to his broker a dispatch directing him to buy certain railroad stocks. The defendant negligently failed to deliver the message. In the mean time the stocks advanced in price, and the plaintiff was compelled to pay more for them. It was held that the difference between what he would have had to pay had the message been properly delivered and what he did pay when he afterwards bought was the measure of his damages. In *Washington etc. Tel. Co. v. Hobson*, 15 Gratt. 122, the plaintiffs sent a message to their agents at Mobile to purchase on their account five hundred bales of cotton. The message as delivered read two thousand five hundred bales. Before the mistake was discovered, 2,078 bales had been purchased. It was held that the measure of damages was what was lost on the resale at Mobile of the excess of the cotton above that ordered, or if not sold there, what would have been the loss on the resale at Mobile in the condition and circumstances in which it was when the mistake was ascertained, including all the proper costs and charges thereon. In *Lane v. Montreal Tel. Co.*, 7 U. C. C. P. 23, the plaintiff, a ship-owner, having been induced by the defendant's error in the transmission of a dispatch to suppose that he could obtain a cargo of eight thousand instead of three thousand bushels of wheat from Chatham to Oswego, abandoned a contract for a cargo from Detroit, and sent his vessel to Chatham, whence she sailed with a cargo of three thousand bushels only. It was held that the damages which naturally resulted from the defendant's breach of duty were the expenses of sending the vessel to Chatham and back; but that the plaintiff was not entitled to claim the profit that he might have made by carrying the eight thousand bushels. The application of the rule will be understood from the foregoing cases.

KNOWLEDGE OF IMPORTANCE OF MESSAGE AS AFFECTING QUESTION OF DAMAGES. — The question whether or not the agent of a telegraph company is, at the time he receives a message for transmission, informed of its meaning and importance, either from the form of the message itself, or from information imparted to him by the sender, is generally regarded as important in determining the measure of damages in actions against the company for its failure, delay, or error in the transmission or delivery of the message. The greater number of authorities hold that where a message is written in cipher which is not understood by the agent who receives it for transmission, and its meaning is not made known to him by the sender, or where the message is so worded that it conveys no idea of its meaning or importance to the agent of the company, nominal damages only — usually the price paid for its transmission — are recoverable from the company for its default. The ground of these decisions is, that, as the meaning and importance of the message were unknown to the company, no other loss or injury could "reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it": *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; 96 Am. Dec. 519; *Beaupre v. Pacific and Atlantic Tel. Co.*, 21 Minn. 155; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452; 48 Am. Rep. 305; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Behm v. Western Union Tel. Co.*, 8 Biss. 131; *Sanders v. Stuart*, L. R. 1 C. P. D. 326; 17 Moak's Eng. Rep. 286. In the case of *Landsberger v. Mag-*

atic Tel. Co., 32 Barb. 530, the plaintiffs contracted with parties in San Francisco to purchase for them in New York three hundred Colt's revolvers, and to deliver them at San Francisco by the steamer which was to sail from New York on the 20th of January, 1857. The plaintiffs, who were to receive a commission for their services, were bound to pay a penalty of five hundred dollars if they failed to perform their agreement. They sent to New York by the Pacific Mail Company ten thousand dollars to be used in purchasing the revolvers, and sent through the defendant this message to their firm in New York: "Get ten thousand dollars of the Mail company." This message was, through the negligence of the defendant, delayed so long that the contract could not be performed, and the plaintiffs were compelled to pay the penalty. It was held that as the company had no information as to the importance of the dispatch, it was not liable to the plaintiff for the loss of his commissions, or for the penalty, because those damages could not fairly be supposed to have been in the contemplation of the parties when they undertook to transmit the message. In *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165, the plaintiff, who had been offered a certain price for his interest in a certain oil-well, telegraphed to his agent this message: "Telegraph me at Rochester what that well is doing." This dispatch was not delivered until several days after it was sent. In the mean time plaintiff went to Rochester, and not receiving any reply, sold his interest in the well for much less than it was worth. It was held that nominal damages only could be recovered. Allen, J., who delivered the opinion of the court, said: "For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it."

This rule has been repudiated in several recent cases, which hold that a telegraph company is liable for not transmitting correctly a cipher dispatch, whose meaning was unknown to the operator, to the same extent as though the message was written in the ordinary way, and its meaning known to him: *Daughtery v. American Union Tel. Co.*, 75 Ala. 168; 51 Am. Rep. 435; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 46 Am. Rep. 715. The same doctrine was also approved in *Hart v. Western Union Tel. Co.*, 4 West Coast Rep. 37, decided by department one of the supreme court of California. But the views of the same court in bank upon the rehearing, reported in 66 Cal. 579, are not in harmony with this doctrine.

The Daughtery case is the first one in which this doctrine was laid down. It admits that the rule in *Hadley v. Baxendale*, *supra*, was properly applied in the peculiar circumstances of that case, but that it cannot be applied in the decision of all cases, and that it cannot properly be applied to transactions or lines of business in which the same measure of diligence is required in each act or function, without regard to the *quantum* of interest to be affected by it, and where the tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor by the magnitude of the interests it concerns.

WHEN DOES MESSAGE DISCLOSE ITS IMPORTANCE?—On the question as to what form of words, in messages other than cipher messages, is sufficient to apprise the company of the importance of the message, it is impossible to reconcile all the cases. There is an evident tendency on the part of courts

to adopt the principle that it is sufficient to render the company liable for actual damages, if the message shows upon its face that it relates to a business transaction, and that loss will probably result unless it is promptly and correctly transmitted and delivered, and that it is not necessary that the company should be apprised of the exact amount of loss likely to result from its default. Considering the nature of the business, this seems to be the proper and reasonable principle to apply.

A few examples of dispatches held to have been sufficient on their face to apprise the company of their importance will illustrate the application of the principle: "Cover two hundred September, one hundred August." This meant, sell two hundred bales of cotton deliverable in September, and one hundred deliverable in August. Speer, J., delivering the opinion of the court, said: "There was at least enough known to show it was a commercial message of value attached to the message, and that is sufficient": *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480. "Ten cars new two whites Aug. shipment, fifty-six half." This was an offer to sell ten cars of No. 2 white oats, to be shipped in August, at fifty-six and a half cents per bushel. Baker, J., delivering the opinion of the court, said: "It was at least evident it was a commercial message of importance; and it disclosed the nature of the business as fully as the case demanded": *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347, 353. "Sell one hundred Western Union. Answer price": *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. "Want your cattle in the morning; meet me at pasture." Niblack, J., delivering the opinion, said: "In this case the terms or contents of the dispatch sent by Clay to Hadley fairly indicated the necessity of its prompt delivery as well as transmission, and were such as to authorize the inference that a delay until the day following would result in confusion, and possible, if not probable, injury to one or both parties to the dispatch": *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 200. "Ship your hogs at once." Miller, J., in delivering the opinion of the court, said: "The obvious reason of this is evident on its face. It clearly imports that to meet a good market the hogs must be shipped at once, and that by delay a good market will be lost. It is equivalent to saying, if you ship at once you will obtain gains on the purchase and sale of your hogs. If you delay, these gains will be lost by the market price declining. It is most obvious, therefore, that the parties contemplated this very thing": *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8. "Ship cargo named at 90, if you can secure freight at 10." Kent, J., delivering the opinion of the court, said: "On its face it gives clear intimation that it is of a business character, relating to a distinct and specific contract, and that, according to the well-known custom of merchants, it must have been understood by the operator, or agent, as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured": *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156. "If we have any Old Southern on hand, sell same before board. Buy five Hudson at board": *Rittenhouse v. Independent L. of T.*, 44 N. Y. 263; 4 Am. Rep. 673. "Will take two cars sixteens. Ship soon as convenient via West Shore." This was sent after the sender had received on the same day, through the same office, a dispatch from Armour & Co., Chicago, a dispatch containing these words: "Pickled hams, sixteens, nine and a half." Martin, J., delivering the opinion of the court, said: "We think the contents of this message were such as to indicate clearly to defendant that it was important, that a contract for the purchase of two car-loads of hams was being made by the parties, and that a failure to send the message must

result in such loss to the parties as would naturally follow from a failure to complete such contract": *Mowry v. Western Union Tel. Co.*, 51 Hun, 126. "Buy fifty Northwestern — Fifty Prairie du Chien, limit forty-five." Thompson, J., delivering the opinion, said: "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it": *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751. "Car cribs six sixty, c. a. f., prompt." This was sent in reply to the following. "Quote cribs loose, and strips packed." In the meat trade, "cribs" means clear ribs, and "c. a. f." means "cost and freight": *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554. "You had better come and attend to your claim at once": *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; *post*, p. 790. "Send bay horse to-day. Mock loads to-night." Mock was a well-known horse-buyer in the habit of shipping horses from the vicinity of the place from which the message was sent, and presumably the defendant's agent knew that fact: *Thompson v. Western Union Tel. Co.*, 64 Wis. 531. But in *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155, it was held that this message did not sufficiently disclose the nature of the transaction to render the company liable for more than nominal damages: "Will take two hundred extra mess, price named." This message was sent in reply to one sent to the plaintiff, who had written to ascertain the price of pork, "Extra mess, \$28.75." This decision is clearly not in harmony with the great weight of modern authorities.

DAMAGES FOR INJURY TO FEELINGS. — The general question of mental anguish as an element of damages is considered at length in the note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534-537. It was held in *Russell v. Western Union Tel. Co.*, 3 Dak. 315, that one to whom a message was sent announcing the death of his sister, and the time when her funeral was to take place, could not recover damages for shocked, injured, and outraged feelings, and mental distress and anguish resulting from the negligent delay of the company in not delivering the message until it was too late to attend the funeral. This decision is approved in the similar case of *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, which disapproves of the case of *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, wherein it was decided that damages might be recovered in such cases for mental suffering alone. These cases proceed upon the established rule that, except in cases of breach of promise of marriage, injuries to feelings or mental suffering resulting from a breach of contract are not independent grounds of damages, so that for these alone a person can sustain an action. But in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, it was held that while in an ordinary contract only pecuniary benefits are contemplated by the contracting parties, and therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards, yet where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages resulting from the breach. It was accordingly held that where two telegrams were sent to the plaintiff, the one informing her that her brother was in a dying condition, and the other announcing his death, and these telegrams were negligently delayed by the defendant, whereby she was prevented from attending her dying brother and from making desired preparations for his funeral, she could recover for the wrong and injury done to her feelings and affections. Caldwell, J., in delivering the opinion in that case, said: "Most of the adjudged cases in which telegraph companies have been required to

respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that, for that reason, the liability should attach and be enforced in such cases only."

In *Gulf etc. R'y Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, the plaintiff sent to his father, through the defendant, operating a line of telegraph, a message announcing the death of his wife and child, and requesting his father to come to his relief. Owing to the defendant's negligence, the message was not delivered in time to enable the father to attend the funeral. It was held that the plaintiff, being entitled to recover nominal damages, — the price paid for the message, — might also recover exemplary damages, if the negligence of the defendant was willful or gross. In *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, the father also brought his action to recover damages for the company's failure to deliver to him the same telegram. But it was held that as he had suffered no actual damage he could not recover for the mental suffering caused by his being prevented from going to his son's aid. The *So Relle* case was disapproved so far as it held that an action for mental suffering alone might be maintained. In *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, it was held that where a basis in actual damages is first laid, a party may recover damages for injury to feelings. In this case, Robertson, A. J., referring to the *So Relle* case, said: "That authority was overruled in the elder *Levy* case only in so far as it held that such damage alone would sustain an action. The two cases conflict in but this one point." This *Stuart* case has been followed in *Loper v. Western Union Tel. Co.*, 70 Tex. 689, and in *Western Union Tel. Co. v. Broesche*, Sup. Ct. Tex., February, 1889. In this latter case, a verdict of \$1,168 was held not to be excessive. In *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181, it was held that a husband could recover for disappointment and anguish caused by his being unable to be present at his wife's death-bed owing to the failure of the defendant to deliver a message. But Maxey, J., in charging the jury, said: "It is my duty to say to you, in reference to the question of damages, that great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a wife with the disappointment and mental anguish occasioned by the fault or negligence of the company; for it is only the latter for which a recovery may be had."

In *Western Union Tel. Co. v. Simpson*, Sup. Ct. Tex., March, 1889, the plaintiff telegraphed from Los Angeles to her agent at Galveston, informing him that her husband had just died, and that she would leave with his body next day, and asking him to send her money by telegraph immediately. She informed the company's agent when she sent the telegram of her distress and urgent need of the money. Through the negligence of the company, the message, when delivered at Galveston, appeared to have been sent from San Francisco, instead of Los Angeles, and, in consequence of the mistake, the receipt of the money was delayed, and the plaintiff suffered great mental anguish and humiliation. It was held that the mental anguish suffered by her was a proper element of damage, under the circumstances of the case, and a verdict in her favor of one thousand dollars was sustained.

But in *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, the plaintiff sent a message from San Antonio to Edinburg, directing that the family carriage should be sent to Pena to meet him. The company had no office at Edinburg, and the message did not reach its destination. The carriage was not sent, and when the plaintiff arrived at Pena, he was compelled to go in a "jerkey" and on a buckboard, by a route which was more than twice as long as the

road he could have gone by had the carriage been at Pena to meet him. On the journey, he was oppressed by dreadful forebodings as to the cause of the failure of the carriage to meet him, imagining that his father must be either dead or sick. It was held that he could not recover damages for the jars and jolts endured by him on the journey, because they were not the natural consequence of the default of the company; nor for the mental suffering alleged, because that was due to his imagining things that had no existence. And in *Western Union Tel. Co. v. Brown*, Sup. Ct. Texas, Nov., 1888, it was held that damages for injury to feelings caused by failure to deliver this message, "Willie died yesterday at six o'clock; will be buried at Marshall Sunday evening," could not be recovered, because the message contained nothing to put the defendant on notice that the deceased was a near relative of the plaintiff. But this case does not seem to be in harmony with the weight of recent authority. The message clearly indicated that its prompt delivery was important, and that mental suffering might, and probably would, result from a failure to make such delivery.

PENALTY IMPOSED BY STATUTE FOR FAILURE OF TELEGRAPH COMPANY to transmit or deliver a message intrusted to it may be recovered without alleging or proving any actual damage: *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744. But in other cases, unless the plaintiff proves special injury or actual damage, he can recover nominal damages only: *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79; *Clay v. Western Union Tel. Co.*, Sup. Ct. Ga., May, 1888; *Culte v. Western Union Tel. Co.*, 71 Wis. 46.

In *Cothran v. Western Union Tel. Co.*, Sup. Ct. Ga., May, 1889, it was held that as contracts for fictitious or option "futures" are illegal in that state, the loss or gain resulting from them cannot be invoked to measure the damages sustained by the sender of a telegram in consequence of a mistake made by the company in transmitting it.

WESTERN UNION TELEGRAPH COMPANY v. SHEFFIELD AND SON.

[71 TEXAS, 570.]

TELEGRAM, "YOU HAD BETTER COME AND ATTEND TO YOUR CLAIM AT ONCE," imparts notice of its purpose, and of the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for its transmission. And the duty of carefulness would not have been more fully indicated to the telegraph company by the insertion therein of the name of the debtors of the sender, in the absence of testimony showing otherwise.

CREDITOR IS NOT BOUND TO INVEST FURTHER TO SECURE HIMSELF against loss from the breach of a contract, by which such loss is caused.

MEASURE OF DAMAGES FOR FAILURE TO DELIVER TELEGRAM, by reason of which a creditor loses his debt, is the value of such debt at the time, with interest thereon at eight per cent until the day of trial, together with the cost of the message.

ACTION to recover damages for delay in transmitting the following telegram: October 27, 1886. To H. Sheffield and

Son, Lodi, Texas. You had better come and attend to your claim at once. W. T. Atkins." The appellees alleged that this message was delivered to the appellant's agent by W. T. Atkins, the cashier of the National Bank at Jefferson, Texas, at 3:30 o'clock, P. M., of October 27, 1886, and was not delivered to the appellees until 8 o'clock, A. M., on October 28, 1886; that Lodi and Jefferson are only nine miles apart; that the appellees were in Lodi from the time of the sending to the time of the delivery of the message, and were doing business there, and well known to appellant's agent in the town, and that the failure to transmit and deliver the message was due to the gross and willful neglect of the appellant and its said agent. The appellees held three notes of Jones, Edgeworth, and Sellers. These notes were deposited with the National Bank at Jefferson for collection as they matured, and with instructions to guard the interests and rights of appellees. The bank became possessed of information of the failing condition of Jones, Edgeworth, and Sellers on the day its cashier, Atkins, sent the telegram to the appellees to apprise them, so that they could take steps to secure their debts. Jones, Edgeworth, and Sellers, at the time Atkins delivered the message to appellant's agent at Jefferson, had more than sufficient property over and above all exemptions to pay the debts of the appellees. About 12 o'clock on the night of October 27, 1886, creditors of Jones, Edgeworth, and Sellers sued out attachments, which were levied about 7 o'clock next morning on all the property of said firm, and the property so levied upon was insufficient to pay off the balance due on the attachment suits. If said telegram had been promptly transmitted and delivered, appellees would have sued out attachments prior to the other attaching creditors, and have made their debts out of Jones, Edgeworth, and Sellers. Other facts appear from the opinion.

Stemmons and Field, for the appellant.

Charles A. Culberson, for the appellees.

WALKER, A. J. The questions involved in this appeal have received much attention from the courts of this state, and the case may be determined by the application of principles which have been recognized from time to time, and so often that they may be followed without question.

The first and second assignments of error put in issue the

sufficiency of the message itself to give notice of its purpose and importance.

The message, "You had better come and attend to your claim at once," addressed to the plaintiffs from Jefferson, indicated with reasonable certainty to the telegraph operator the facts,—1. That plaintiffs had a claim of some pecuniary nature; 2. That the claim should be attended to at Jefferson; 3. That the matter was urgent, "at once"; and 4. Loss would probably follow want of such attention, which might be prevented by obeying the call made in the dispatch. This was sufficient to disclose that the object was to enable plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness.

The second assignment of error further complains at the refusal of the court to instruct the jury, at request of appellant, "that unless they find and believe, from the evidence, that defendant knew from the message, or from the facts communicated to it at the time it accepted said message, that the object of said message was to enable plaintiffs to collect their debt from Jones, Edgeworth, and Sellers, the loss of said debt cannot be estimated by them in arriving at the damage done plaintiffs."

The rule in *Hadley v. Baxendale*, 9 Ex. 341, adopted in Texas for the measure of damages, and applied to telegraph companies in their work, is: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may be fairly and reasonably considered either arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as to the probable result of the breach of it."

The last clause in this citation is further explained or enlarged in *Baldwin v. United States Tel. Co.*, 45 N. Y. 750, 6 Am. Rep. 155, cited by the court in *Daniel v. Western Union Tel. Co.*, 61 Tex. 457, 48 Am. Rep. 305. "The damages given by way of indemnity have been the natural and necessary consequences of the breach of contract in the minds of the parties interpreting the contract in the light of the circumstances under which it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment

of damages for the breach." In other words, when applied to this case, the telegraph company should not be chargeable with any intent or purpose of which it is not informed, either by the terms of the message or otherwise.

The charge asked was intended to limit the "special purpose" to the collection of the claim against Jones, Edgeworth, and Sellers, and appellant insists that any less information would not place such claim within the contemplation of the parties when the message was delivered to the operator. The terms "special purpose" and "notice," used in the definitions above, should receive reasonable interpretation,—with reference to the subject to which they are applied. So far as would be important to the telegraph company, it would be sufficient to caution it against probable loss; that it be informed that the message related to a pecuniary claim which was in danger, and needing attention. It is elementary that by notice is included knowledge of and means of knowing the fact.

That the claim was against the particular firm was and could have been of no concern to the telegraph company. No greater or other care would have been anticipated to protect a claim against one firm than any other, in absence of any other fact. That the message was for the special purpose of enabling the plaintiff to attend to a money claim at Jefferson was a sufficiently specific designation of the importance and purpose of the message; and this was evident from its terms.

The natural consequences of failure to give at once the attention to the claim can be considered as within the contemplation of the parties.

The court probably would have been justified in charging the effect of the terms used in the dispatch. This was not done. The jury were instructed that, in order to recover, the plaintiffs must show "that defendant's agent was apprised, from the language of the message, that its prompt transmission was of urgent pecuniary importance to plaintiffs." Again, that the defendants "are not liable for damages (beyond the price paid for sending a message) for a failure to send and deliver in time, unless they are apprised and put upon notice by the sender of the urgency and necessity of promptness in its transmission and delivery; they must be notified by the sender in some way of the fact that a want of promptness will result in injury to the party interested in the same."

Again, the jury were further instructed that if, among other things, "you find that defendant's agents receiving and trans-

mitting the same had notice that it was important to plaintiffs that said message be sent through and delivered without unnecessary delay," then plaintiff would be entitled to recover.

On the other hand, the jury were instructed that "if you find that said message was not sufficient on its face to put the agent who received it for transmission on notice of its import, and that it involved probable injury if not promptly sent and delivered, . . . you will find for defendant."

From these extracts from the general charge of the court, it is manifest that the jury were clearly informed of the importance to be attached to the meaning of the message, and of the necessity of their finding in it evidence of its purpose, and of the importance of its prompt delivery. The instruction asked by the defendant was properly refused. It exacted a minuteness of detail, unnecessary for the information of the company, of the nature and extent of the interest involved in the transaction: *Daniel v. Western Union Tel. Co.*, 61 Tex. 457; 48 Am. Rep. 305; *Edsall v. Western Union Tel. Co.*, 63 Tex. 677; *Stuart v. Western Union Tel. Co.*, 66 Id. 583; 59 Am. Rep. 623; *Western Union Tel. Co. v. Brown*, 58 Tex. 174; 44 Am. Rep. 610; *Loper's Case*, 70 Tex. 689; *United States Tel. Co. v. Wagner*, 55 Pa. St. 267; 93 Am. Dec. 751; *Manville v. Western Union Tel. Co.*, 37 Iowa, 220; 18 Am. Rep. 8; *United States Tel. Co. v. Gildersleve*, 29 Md. 251; 96 Am. Dec. 519; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 460; 20 Am. Rep. 605; *Candee v. Western Union Tel. Co.*, 34 Wis. 480; 17 Am. Rep. 452; *Tyler, Ullman, & Co. v. Western Union Tel. Co.*, 60 Ill. 439; 14 Am. Rep. 38; *Beaupre v. Pacific and Atlantic Tel. Co.*, 21 Minn. 158; *Squire v. Western Union Tel. Co.*, 98 Mass. 237; 93 Am. Dec. 157; *Parks v. Alta California Tel. Co.*, 13 Cal 422; 73 Am. Dec. 589; *Western Union Tel. Co. v. Reynolds Brothers*, 77 Va. 179; 46 Am. Rep. 715; *Daughtery v. Western Union Tel. Co.*, 75 Ala. 170-174; 51 Am. Rep. 435; 1 Sedgwick on Damages, 7th ed., 231-239. These cases have been examined. There is much diversity as to the rule of consequential damages. As stated above, the decisions of our own state have been adhered to, and they follow the great weight of authority, in number at least, of the courts.

The third assignment is to the refusal of the court to give the special charge asked by defendant: "If the jury find and believe, from the evidence, that plaintiffs had a levy of their attachment on the property of Jones, Edgeworth, and Sellers sufficient in value to satisfy the same and the other attach-

ments levied prior to plaintiffs' attachment, and suffered the prior attaching creditors to purchase said property at public sale at less than the value of said property, they should then find for the defendant, except for the amount paid for transmission of said message, and interest thereon at the rate of eight per cent per annum from date of payment."

There is no evidence of any unreasonable sacrifice of the property at the sheriff's sale; nor is it shown that the appellees themselves bought the stock of goods. Indeed, there are only the isolated facts that the goods seized were estimated at twelve thousand dollars in value; that there were prior attachments upon the goods to near eight thousand dollars, and that the sheriff did not realize sufficient to pay the prior liens.

The court had charged the jury that "if it appears that plaintiffs were in a position and condition to have made their debt out of said property, and failed to do so, then for so much as they could have saved out of said property they cannot recover."

It is elementary that a party claiming damages must not be in fault in contributing to them by his own want of proper care; and such care must extend to the protection from further loss after the act complained of. But this rule must be rationally applied. It is not required that everything possible must be done to prevent or limit the extent of the loss. It is not shown that the plaintiffs had the means or could have commanded them to advance the prior claims; nor is it shown to have been the reasonable duty of the plaintiffs, from the condition of their business, to have done so if they had had the means. There is nothing to show that the money realized upon the sheriff's sale was not the reasonable cash price of the stock sold, notwithstanding the estimated larger value. A party is not required to invest further in order to secure himself against the consequences of a breach of contract by which he suffers injury: *Ill. Cent. R. R. Co. v. Cobb, Christy, & Co.*, 64 Ill. 142.

The fourth assignment is not well taken, in view of the instruction already given, "that before plaintiffs can recover for such damage, it must appear, from the evidence, that had the message been promptly transmitted and delivered, plaintiffs could and would have secured and collected the debt they claim to have lost, or a part thereof."

As to the sufficiency of the testimony, there is no issue made as to the existence of a cause for attachment against the

debtors. This conceded, the issue was as to the effect of the delay upon the ability of the plaintiffs to avail themselves of the means present of making their debt. The testimony develops that in reasonable probability they could have made the debt in attachment proceedings, or by the purchase of the stock of the debtors. The activity shown to have been exerted, the means of travel between the places, and the preference obtained by others through the delay, were passed upon by the jury, and they were required to find, from all the testimony, that but for the delay in transmission of the message the debt would not have been lost. It cannot be said that the jury found their verdict without evidence.

The verdict was: "We, the jury, find for the plaintiff the sum of \$1,684.40, with interest at eight per cent per annum from October 28, 1886." This sum was evidently obtained by adding the interest (which was twelve per cent) upon one of the notes, which was overdue, to the aggregate of the notes and the cost of the message. The form of the verdict is of little importance in finding eight per cent per annum interest from the date of the note for which recovery was had. The measure of damages in like cases is the amount of loss with such interest added. It will not vitiate the verdict that the interest was not computed and the amount named as the damages.

It is held,—1. The message, "You had better come and attend to your claim at once," imparted notice of its purpose and of the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for the transmission of the message. 2. That the duty of carefulness would not have been more fully indicated to the telegraph company by the insertion therein of the name of the debtors, in the absence of testimony showing otherwise. 3. The law does not impose upon a creditor the duty of further investment of his money to secure himself against loss for the breach of a contract by which such loss is caused; it is not, therefore, an act of negligence that the appellees did not buy it at the sheriff's sale, or discharge the prior liens, although the estimated or real value of the property was, in excess of the prior liens, sufficient to have paid their notes, in absence of testimony to their condition as to their means to do so, and testimony showing it their duty, under the circumstances, as ordinarily careful and prudent men, to do so. 4. The measure of damages upon the facts found by the jury is the value of

the notes to which is added the cost of the message, if such be the extent of loss shown, with eight per cent interest to the day of the trial.

Finding no error in the record, the judgment below is affirmed.

TELEGRAPH COMPANIES. — Elements of damage for not sending or not delivering telegrams: See monographic note to *Western Union Tel. Co. v. Cooper*, ante, p. 778.

TELEGRAMS. — Companies, when they have notice of the importance of their messages, whether they be in cipher or not, must transmit immediately and deliver promptly: *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 46 Am. Rep. 715; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; and other cases cited in the opinion of the principal case.

KASLING v. MORRIS.

[71 TEXAS, 584.]

OFFER OF REWARD FOR ARREST OF CRIMINAL, WHEN ACTED UPON, IS BINDING upon the party making it. His secret motives for making the offer form no part of the contract with the party acting upon it, nor will the fact that he expected others than the one arrested and proved guilty to be arrested relieve him from his offer, when it has been acted upon.

CONSTABLE MAY CLAIM REWARD FOR MAKING ARREST NOT REQUIRED BY HIS OFFICIAL DUTY; as where he makes the arrest without a warrant, without having seen the offense committed, and without information that the person he arrested was the guilty party.

ACTION to recover reward. The opinion states the case.

O'Neal and Eberhart, and Todd and Rowell, for the appellants.

WALKER, A. J. On the tenth day of March, 1886, at night, the storehouse of appellee, R. A. Morris, in the town of Linden, Cass County, Texas, was broken into, and his iron safe, therein situated, was very artistically blown open, burglarized, and robbed of about \$175 in money. Early next morning, and immediately upon the discovery of the burglary, Morris publicly, and many times, offered a reward of one thousand dollars for the arrest and conviction of the thief or thieves. Plaintiff E. S. Kasling was the constable of the town and precinct where the burglary was committed, and plaintiff Simmons was a private citizen who had on some occasions acted in an official capacity as deputy sheriff. Among others, Morris told Kasling he would give one thousand dollars for the arrest and conviction of the party committing the burglary,

and Kasling informed Simmons of the reward offered, and requested him to go with him in search for the thief. Rand, Taylor, and other parties also mounted horses and went in different directions to try to find the burglar or burglars, the hope of the reward being the immediate inducement.

Kasling and Simmons mounted horses, and rode some miles in the country in search of the burglar or burglars, and on their return saw a man on foot near the road, whom they accosted and finally informed that they must search him. They were ready with their pistols and "got the drop on him," fortunately, or doubtless one or both of them would have been shot; for, on forcing him to hold up his hands, they found two pistols on different portions of his person, to one of which he had motioned his hand; and also conclusive proof that he was a burglar, besides the whole of the stolen money, and a pistol that had been stolen, the same night of the house burglary, from another store in Linden that had been broken into. They arrested him without warrant or affidavit, and took him at once to Linden and lodged him in jail. Kasling then made the necessary affidavit and procured a warrant, and on trial the prisoner waived an examination and was by the magistrate committed to answer the charge of the burglary of Morris's store and safe. At the ensuing term of the district court of Cass County, Texas, the prisoner, James Sanders, was duly indicted for the burglary and theft in Morris's store (and for other felonies committed the same night), and was tried and convicted, E. S. Kasling being present and testifying in behalf of the state. Morris disobeyed the process of the state, and left the country to avoid testifying against him. Sanders was duly convicted of said offense and consigned to the penitentiary.

After the conviction of Sanders, appellants went to Morris, and demanded the one thousand dollars reward. Morris at first evaded, and asked delay and time to see his attorney. He finally refused to pay, whereupon appellants brought this suit, which was submitted to the court without a jury, on the above facts, and was decided against appellants, and in favor of Morris, both on the law and the facts, and appellants have taken this appeal.

The foregoing statement, adopted from the brief of the appellants, presents a fair and reasonably full statement of the case shown in the record.

The statement of facts shows that Morris offered the reward

as alleged. The offer was public and repeatedly made, and in several instances it was accompanied by special request to parties to act upon it, and to engage in the search for the guilty party. In one or more instances he was asked if he was serious in making it, and he replied he "was, and had the money to pay it."

Unquestionably, such an offer when and after it has been acted upon becomes binding upon the party making it: *Hayden v. Sanger*, 56 Ind. 46; 26 Am. Rep. 1. It is not disputed that Kasling and Simmons acted upon the offer, and arrested Sanders, who was subsequently convicted for the offense of burglary in breaking open and stealing from Morris's storehouse.

Morris, the defendant, testified to his suspicions, which he told to others, that the burglary was another "Keating affair," meaning that he thought it had been committed by persons residing in the neighborhood; that he had named one as suspected, and that he thought three or more persons had been engaged in the crime; and substantially that his motive for making the offer was to rid the neighborhood of dangerous criminals.

However true his testimony may have been, the testimony of many witnesses supports the allegations in the petition, and that these motives in fact formed no part of his public offer. That offer did not restrict the reward so that it was to be given upon the detection, arrest, and conviction of the village blacksmith and his supposed associates as the guilty party. Nor would Kasling's knowledge of the motives inducing to the offer or the direction of Morris's suspicions of itself alter the terms of the public offer, or prevent Kasling from acting upon it.

Of course, if in the private conference between Morris and Kasling the latter was informed that the offer was restricted, it would, to that extent, require notice by Kasling. It is noted, however, that Kasling distinctly denies the statement made by Morris as to the conversation between them before the arrest. What passed in that conversation is a question of veracity between the two interested parties. Nor were the plaintiffs disqualified from earning and exacting the reward under the offer by reason of the fact that Kasling was constable of the beat in which the arrest of Sanders was made. Kasling requested Simmons to arm himself and join in the search, assuring him of the offered reward. It appears that the arrest was

made several miles from the county seat; was made without warrant. Kasling had not seen the offense committed, nor had he any information that Sanders was the guilty party other than his own suspicions when they met on the road. The act was not required by his official duty.

It is well recognized that an officer is not entitled to reward beyond his legal fees for the performance of an act which it is his official duty to perform. The employment and payment for extra official work, though incident to his official duty, is not against public policy. Detective work usually is directed to the task of hunting up the perpetrator of some offense where the ordinary machinery of the courts needs such aid. This work is only incidental to the official duty of the constable or sheriff: R. S., art. 4537; Code Crim. Proc., arts. 44, 45; Addison on Crimes, 18.

The testimony shows that the offer was made and its terms met by a great preponderance in the testimony, so great that the judgment should be reversed.

REWARD FOR ARREST OF CRIMINAL. — Any person may bind himself by a public offer of a reward for the arrest of a criminal offender, whether such offer is oral or otherwise: *Hayden v. Sanger*, 56 Ind. 42; 26 Am. Rep. 1; *Janvrin v. Town of Exeter*, 48 N. H. 83; 2 Am. Rep. 185; *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634, and note; *Murray v. Kennedy*, 15 La. Ann. 385; 77 Am. Dec. 189.

CONSTABLE OR OTHER OFFICER relying upon an offer of reward is entitled to it, when making an arrest under circumstances which do not require him to make the arrest as an official duty: *Hayden v. Sanger*, 56 Ind. 42; 26 Am. Rep. 1; *Davis v. Munson*, 43 Vt. 676; 5 Am. Rep. 315.

MANN v. KELSEY.

[71 TEXAS, 609.]

PROCEEDS OF VOLUNTARY SALE OF HOMESTEAD ARE LIABLE TO EXECUTION.

MONEY IN HANDS OF SHERIFF BELONGING TO JUDGMENT DEBTOR against whom he holds an execution may be applied by him to such execution, although it has been made by him on execution.

STATUTORY proceeding. The opinion states the case.

Gordon and McMurray, and Wallace Hendricks, for the appellant.

Charles Soward, for the appellees.

HOBBS, J. This was a statutory proceeding, instituted under articles 2324 and 2325, Revised Statutes, by appellees on this appeal, C. K. and M. J. Kelsey, against W. J. Mann, sheriff of Wise County, appellant, requiring him to pay over money collected by him under an order of sale issued from the district court of said county, in their favor, against one T. V. Shilling, for \$374.60.

There is no material controversy about the facts in the case.

Appellees recovered a judgment upon two notes, amounting to \$374.60, with ten per cent interest per annum, against Shilling, in the district court of Wise County, with a foreclosure of the vendor's lien upon the land sold by them to Shilling, it being their homestead at the time of the sale to Shilling. An order of sale issued, and W. A. Huffman became the purchaser at the sale, paying to the sheriff, appellant, the sum of four hundred dollars. After satisfying the execution and costs, a balance remained in the sheriff's hands of \$375.40, which appellees demanded, and which appellant refused to pay over, upon the ground that he had applied it to valid executions then in his hands against appellee C. K. Kelsey and E. Henson, in favor of W. A. Huffman, amounting in the aggregate to \$358.55; that the money in appellant's hands was the community property of appellees, and was subject to said executions. At the time of the sale of the land to Shilling by appellees, it was their homestead; and it was the intention of appellees, when the notes sued upon were collected, to invest the proceeds in another home, having no other means for that purpose. Since the sale to Shilling of appellees' home, they had taken steps to obtain a home in Erath County under the pre-emption laws, and caused the same to be surveyed, but subsequently ascertained that the survey selected had been previously located. Judgment was rendered in the lower court against appellant, Mann, for \$375.40, with interest at the rate of ten per cent per annum, and \$90.20 damages.

This judgment was subsequently set aside and reformed, and judgment rendered against him for \$375.40, and costs, and judgment for the sureties for their costs. From this judgment both parties have appealed.

The questions involved in this appeal are, first, whether the money, \$375.40, in the hands of the sheriff, appellant, and collected by him under the order of sale issued upon the judgment in appellees' favor foreclosing the lien upon the home-

stead, was exempt from execution and seizure by reason of the fact that this amount was the proceeds of the sale of the homestead, and was intended by appellees to be invested in another home, they then being without one, except in so far as their homestead rights might exist under the settlement, survey, and residence in Erath County, by virtue of the pre-emption law; that they were still residing upon the land in Erath County, and had settled upon it with the intention of making it their homestead. After appellees had caused the survey to be made of the tract of land in Erath County, the surveyor warned them not to put any valuable improvements thereon, because it had been located. Appellees placed none on this land, but rented and cultivated an adjoining tract of land. No patent had issued to the land upon the location prior to appellees, and they were uncertain as to the title being issued to them.

The exchanges made of exempt property for other property are by law classified into two kinds, voluntary and involuntary; the legal effect of the former differing materially from that of the latter, according to the principles laid down and concurred in by a majority of the American courts.

In reference to a voluntary exchange of property specifically exempt from execution for property not so exempt, the debtor, in such a case of a voluntary exchange of property, cannot claim exemption for the property received in exchange.

The reason of the rule is said to be, that the law designates the species of property it exempts, and does not allow the debtor to choose for himself in respect to the kind or species of property to be exempted. To permit this, would be to substitute the choice of the debtor for the provisions of the statute. When exempt property is voluntarily converted into money, or other property not also exempt by law, the right is gone: *Thompson on Homesteads*, sec. 750; *Whittenberg v. Lloyd*, 49 Tex. 642; *Schneider v. Bray*, 59 Id. 670.

In the case of *Watkins v. Blatschinski*, 40 Wis. 347, it was held that the proceeds of the sale of the homestead was protected, when designed in good faith to be applied to the purchase of another, and while in transition from one homestead to another. But this decision is based upon a statutory provision with reference to that subject in that state. We are not aware of any such statutory regulation in our state with respect to the proceeds of the sale of the homestead.

In the case before us, whatever may be the hardship arising

out of the rule, it is the result of the voluntary act of the appellees, in exchanging property fully protected by the law for that to which the law affords no such protection as is claimed. And we are, therefore, of opinion that money in the hands of the sheriff, collected under an order of sale issued upon a judgment foreclosing the vendor's lien upon the judgment creditor's homestead, which had been voluntarily sold, is subject to valid executions in the sheriff's hands.

Appellees—who are appellants on cross-appeal—assign as error the refusal of the court to allow them ten per cent per annum and five per cent per month on the money collected by the sheriff, and which he refused to pay over.

There can be no question that appellees' motion was in strict compliance with the rules of practice prescribed by the supreme court under this statute: R. S., arts. 2324, 2325. It was not a suit against the sheriff, but it was in the form of a motion. The money was shown to have been collected by the sheriff; the demand was made for payment, and it was filed at the term next following the demand, and in the court from which the order of sale issued; but it is admitted that the money was applied by the sheriff to the payment of regular executions already in his hands, issued upon valid judgments, and the return thereof made by him. This confronts us with the question whether money so in the hands of the officer is subject to execution. This question was thoroughly discussed in the well-considered case of *Hamilton v. Ward*, 4 Tex. 365, in which a motion was filed against the sheriff for failing to make a return, and for refusing to pay over money collected under an execution. The judgment and execution were in proof, as were also the facts that he had collected \$192.56, and had applied the same to an execution against the plaintiff and Hamilton in favor of Latimer and Bagby.

This case cited is characterized by an exhaustive review of the leading cases having reference to this subject, notably the cases of *Dolby v. Mullins*, 3 Humph. 437, 39 Am. Dec. 180, and *Fendall v. Turner*, 1 Cranch C. C. 35. The last-named case, supporting the proposition that money in the hands of the sheriff cannot be levied on and applied to an execution against the owner of the money, was reviewed by Judge Green in *Dolby v. Mullins*, citing Justice Buller, 1 Term Rep. 370; and, says Judge Wheeler: "The argument [of Judge Green] answered, in every aspect which that argument [in *Turner v. Fendall*] has presented the question, with equal clearness and

force of reasoning, and with almost the precision of actual demonstration." Our supreme court felt no hesitancy in adopting it as the judgment of the court. And it was concluded that the sheriff had the right to appropriate the money of the plaintiff in his hands in satisfaction of the execution against the plaintiff, and the judgment below against the sheriff was reversed and dismissed:

In *McClane v. Rogers*, 42 Tex. 218, it is held that if money comes into the hands of the sheriff while he holds a valid execution against the party to whom it belongs, he may no doubt apply it in satisfaction of such execution. To the same effect is the case of *Walton v. Compton*, 28 Tex. 575.

We do not think the judgment against appellant, Mann, is authorized under the law and facts in this case, and are of opinion that it should be reversed and the cause dismissed.

HOMESTEADS. — The proceeds of a sale of a homestead are liable to execution, unless the vendor at the time of the sale intends to re-invest such proceeds in another homestead: *Smith v. Gore*, 23 Kan. 488; 33 Am. Rep. 188. And so an insurance company is liable as a garnishee of the assured after loss, although the property was exempt from attachment or execution: *Wooster v. Page*, 54 N. H. 125.

EAST LINE AND RED RIVER R. R. Co. v. SCOTT.

[71 TEXAS, 703.]

SECOND CONTINUANCE IS PROPERLY REFUSED TO RAILROAD COMPANY applying therefor on account of the absence of a witness in its employ residing in another county, where, relying upon being able to have him personally present at the trial, it made no effort to take his deposition, but was disappointed by reason of the fact that one of its officials had given him leave of absence.

WATCHMAN DIRECTED BY LOCOMOTIVE ENGINEER DISABLED BY SICKNESS TO TAKE CHARGE OF ENGINE is, while running the engine, an employee of the company, and as such entitled to recover damages for injuries received by him from imperfect machinery furnished by the company for use in its service, notwithstanding a rule of the company forbade the engineer to permit any person other than himself to take charge of the engine, where it is shown that such rule was not intended to be enforced when, on account of the sickness of the engineer, it became necessary for his duties to be performed by another.

SERVANT IS DEEMED TO BE IN MASTER'S SERVICE WHENEVER PRESENT TO PERFORM HIS DUTY under the contract creating the relation of master and servant, and subject to orders, although at a given moment he may not be engaged in the actual performance of any labor.

CONTRIBUTORY NEGLIGENCE, WHEN FACT FOR JURY. — Whether or not the act of an engineer in leaving his engine when the train stopped, and

going to another car in the train, where an explosion occurs through which he is injured, is contributory negligence on his part, is a question for the jury.

WHERE THERE IS TESTIMONY OF SEVERAL FACTS FROM WHICH NEGLIGENCE MAY BE INFERRED, it is not error to refuse an instruction pointing out a single fact in evidence as insufficient to prove negligence.

EVIDENCE SHOWING WHAT INQUIRY MASTER MADE AS TO COMPETENCY OF SERVANT, and what knowledge he had, or obtained on inquiry, should be considered in determining the question whether or not he exercised due care to inform himself as to the competency of the servant. And if it be contended that a master knowingly employed an incompetent servant, it would seem that this fact ought to be established by evidence tending to show that the master had been in a position to know that the servant was incompetent, or the general reputation of the servant should be shown to be such as to induce the belief that his incompetency must have been generally known.

ACTION for personal injuries. The court gave the following instructions to the jury: "7. The burden of proof is on plaintiff to show, by a preponderance of testimony, his right to recover. He must, before he can recover, show that he was injured substantially as alleged; that such injury resulted from an explosion of a boiler used on a pile-driver of defendant's, and that such explosion occurred by reason of defect in said boiler, or in consequence of the incompetency of the engineer in charge of the boiler which exploded, or by both such causes combined. 8. If the evidence should show that plaintiff was injured by such explosion as alleged, yet if it also appears that plaintiff, at the time of such injury, was away from the place at which his duties required him to be (if you find that he was in defendant's employment), and that he voluntarily placed himself in a position of danger, and in consequence thereof received the injuries complained of, then he could not recover, no matter whether such boiler was defective or the engineer in charge was incompetent or not. 9. Or if you find that said boiler exploded because of defects in material, and plaintiff knew of such defects before the explosion, or might have known the same by the use of observation in the course of his employment, and by placing himself near the same was injured by the explosion, or if such boiler exploded in consequence of incompetency of the engineer, and plaintiff knew of such incompetency before the explosion, then he cannot recover. . . . 10. If plaintiff was, at the time of the explosion, engaged in the management of an engine of defendant on its railroad, then the engineer on the pile-driver and plaintiff would be fellow-servants, and for an injury resulting

to plaintiff from carelessness or negligence of such engineer, plaintiff cannot recover. 11. . . . A railroad is required to use care and caution in providing its employees with safe machinery with which to perform the duties required of them in the service. It is also required to use care and caution in selecting skillful and competent engineers and other employees to perform the service required. And for any injury resulting to an employee from a failure to use such care and caution, such railway company is liable, unless the injury results from negligence or want of care on the part of such employee or that of a fellow-servant. . . . 13. . . . If you find, from the evidence, that the plaintiff was injured in the manner as alleged, and that at the time of the injury he was in the employ of the defendant as a night-watchman, and that his duties as such were performed at a different place from that at which the injury occurred, then, before plaintiff can recover, he must show that he was properly at the place where the injury occurred, and that his presence there was in the performance of a service for defendant. 14. If plaintiff, being a night-watchman of defendant, was at the time of the explosion at the place of explosion, and was sent there in charge of the engine which pulled the car on which was the boiler that afterwards exploded, by direction of one Sprague, the regular engineer in charge of said engine, and you further find that, under the custom and usage of defendant's road management, plaintiff was expected or required to obey said directions, and went in obedience to said Sprague's directions, then if plaintiff was injured by said explosion while at a proper place in carrying out said directions, by the acts of negligence of defendant as charged, defendant would be liable. 15. If you find, from the evidence, that plaintiff was rightfully at the place of the explosion, under the instructions given in the preceding paragraph, and you further find that he left his engine, and went to the boiler that exploded, and you find that he had no reason to believe that said boiler was in danger of explosion, and in so going near it he did what was usual in such case on part of train-men, and there was no apparent danger in so doing, and it was such an act as a man of ordinary prudence and caution would commit, then the same would not defeat his right to recover, if he was otherwise entitled to recover under the evidence and the instructions herein given." The sixth instruction, referred to in the opinion, which was asked by the defendant, but not given, is as follows: "If it appears, from

the evidence, that the plaintiff was in the employ of defendant in the capacity of a night-watchman for the engine of a pile-driving train, and he was a fellow-servant with Stalzredie, the engineer of the pile-driving engine, then, before plaintiff can recover, he must show by the evidence,—1. That Stalzredie was an incompetent engineer; 2. That the defendant company knew of his incompetency, or might have known it by reasonable inquiry; 3. That plaintiff did not know of his incompetency, and could not have known it by reasonable diligence. The burden is upon the plaintiff to prove these facts.” Other facts are stated in the opinion.

F. M. Prendergast, for the appellant.

C. A. Culberson, for the appellee.

STAYTON, C. J. This action was brought by appellee to recover damages for an injury that he alleged was caused to him while in the employment of appellant, by the explosion of the boiler of an engine used to operate a pile-driving machine.

The action was brought in Marion County, where tried, and when the cause was called for trial the appellant made an application for a continuance based on the absence of F. M. Sprague, who resided in Hunt County. The witness had testified by deposition, and the appellant desired his presence in order that he might explain a part of his evidence already given. No effort had been made again to take his deposition, but being in the employment of appellant, it depended upon having him present on the trial, but in this was disappointed by reason of the fact that one of appellant's officials had given him leave of absence.

The bill of exceptions shows that the application was for a second continuance. No such diligence as the law requires had been used, and the court below did not err in overruling the motion for a continuance.

It seems that the appellee was in the employment of appellant as a fireman, when he was directed by the proper authority “to go to Carson and stay with engine 190 and the pile-driver as watchman.” This was on February 5, 1886; and in obedience to the order, he went. There was some pile-driving to be done about one mile and a half west of Carson, at a bridge, and on the morning of the next day the train with pile-driver, having remained during the night at Carson, went to the place where the work was to be done, with the regular engineer, F. M. Sprague, in charge of the locomotive.

The train with pile-driver returned to Carson at noon, and went out again in the afternoon in charge of the fireman, but soon returned to the side-track at Carson to let a train pass.

After this, Sprague, the engineer, was sick, and he directed the appellee, in charge of the locomotive, to take the train to the place where the piles were to be driven, which he did.

Behind the locomotive were the tender, caboose, and car on which was the pile-driver and engine to operate it.

When the train arrived at the place where the work was to be done, appellee and others of the crew went to the car on which was the pile-driver and its engine, and soon after the boiler of this engine exploded, causing the injury to appellee, of which he complains.

Appellee alleges that the explosion was caused by defects in the boiler, and by the want of proper skill in the person who was operating the engine for the pile-driver.

The evidence for appellee shows clearly that the boiler was very defective, and tends to show that the person who had charge had but little, if any, experience as an engineer.

No evidence was introduced to show that the engineer was competent, or that any inquiry had been made as to his competency; but a witness for appellant, who examined the boiler on the day it was sent out, stated that he thought it then in good order, and that from an examination made after the explosion, he thought it was caused by an overpressure of steam.

F. M. Sprague, the locomotive engineer, testified that "John S. Scott, the appellee, ran the engine out on the morning of the explosion by my request, as I was sick, and not able to handle the engine. Scott's duty was to watch the engine at night; it was not his duty to take the engine out from Carson that day, but at my request he did it. I requested him to take the engine out, as it was the custom for watchmen, and men who were hired as Scott was, to assist the engineer in case of sickness, as he was an old fireman, and I thought him a competent man to handle the engine. Scott's time was his own from seven o'clock in the morning until six o'clock in the evening. He was requested by me to handle the engine as aforesaid. Scott took the engine at my request; if he had not taken it, my opinion is, the result as to him would have been the same. When Scott arrived at the bridge, he stopped the engine and came over on the pile-driver car with the train-crew. I don't know what he was doing at the time of the explosion. He was

on the third car from the locomotive. I don't know how came him to be there."

It is shown that appellee was not actually doing anything at the time of the explosion; that his bedding was in the caboose, where he slept, and there was evidence tending to show that his duties as watchmen only would not have taken him from Carson, and that he might have spent the day as he pleased if under no obligation to obey the orders of Sprague.

The evidence tended to show that a rule of the company forbade an engineer to place his locomotive in the control of another, and that this rule was known to Scott at the time of the trial, but his knowledge in this respect, on the day of the explosion, was not shown.

Appellant asked the following instruction: "It appears that the plaintiff had no duty to perform at or near the pile-driving engine, and he was there on the car merely to suit his own pleasure. He cannot recover. You will therefore find for defendant,"—which was refused, and this is assigned as error.

The court, in effect, instructed the jury that appellee might recover, if injured as alleged, without negligence on his part, although his duties, as watchman only, did not require him to render the services rendered at request of the engineer, if "under the custom and usage of defendant's road management plaintiff was expected to obey" the orders of the engineer under the circumstances. This charge is also assigned as error. Appellant contends that it was a violation of the rules of the company for the engineer to place his engine in the hands of appellee, and that for this reason the latter cannot recover.

If the appellee had been injured while in the act of performing an act or through the performance of an act known to be forbidden by the rules of the company, it is clear that he could not recover. He, however, was not injured in either of those ways.

If it be contended that appellee was wrongfully, or not in course of the service, at the place where the explosion occurred, by reason of the fact that he went there in performance of a duty that, under the rules of the company, the engineer was forbidden to permit any person other than himself to perform, then, under the evidence, it would be necessary to ascertain what effect should be given to the rule claimed to have existed.

The testimony of Sprague shows that the general rule which

forbade an engineer to give another charge of his engine was not intended to be enforced when on account of the sickness of the engineer it became necessary for his duties to be performed by another.

The rule, then, had its exception, which was applicable at the time appellee went to the place where the explosion occurred in charge of the locomotive.

Proper rules which are usually and customarily violated are presumed to be not intended for enforcement, — not rules at all.

If, under the evidence, the appellee had been injured by an explosion of the boiler of the locomotive caused by such defect as would fix liability on the master for an injury to a servant, we do not see that appellant would not have been liable.

It is true that the employer is only liable as master to the servant when the latter is actually in his service, and that at times, during the period of an engagement, the employee may sustain to the employer no other relation than that of stranger.

It does not follow from this, however, that the employee is to be deemed in the employer's service only when he is actually engaged in labor.

He is to be deemed in the master's service whenever present to perform his duty under the contract creating the relation of master and servant, and subject to orders, although at a given moment he may not be engaged in the actual performance of any labor.

We are of the opinion that the evidence shows a state of facts which require the appellee, as the servant of appellant, to be with the train at the time he was injured. The fact that he may not have been actually engaged in the performance of labor at the time he was injured, if he was with the train in discharge of a duty the engineer had power to impose upon him by virtue of his employment, and subject to further orders, would not for the time destroy the relation of master and servant, and make him a stranger to appellant.

This being true, there was no error in refusing the charge asked, nor in giving the charge complained of.

Had the appellee, when the train stopped, remained with the locomotive, and been there injured by the explosion of the boiler, and in operating the pile-driver, he would doubtless have been entitled to recover if there was a failure of the master to use such care as is required in reference to machinery

placed in the hands of employees to be used in the master's service.

Whether the act of the appellee in leaving the locomotive when the train stopped, and going to the place where the car with the pile-driver was, was contributory negligence that would defeat a recovery, was a question for the jury. No question as to this is raised in this court, nor does it appear that such a question was raised in the court below.

The proposition sought to be maintained throughout is, that the relation of master and servant did not exist at the time the injury was inflicted, and that for this reason appellant did not owe to appellee any duty other than such as it owed to every stranger.

The appellant asked a charge to the effect that the incompetency of the engineer in charge of the boiler that exploded could not be proved by one single act of negligence, and this was refused. The court did not err in refusing the charge, for it was not applicable to the facts in proof.

The testimony introduced to show the incompetency of the engineer consisted of evidence tending to show his entire want of experience as an engineer, and that his avocation was that of a bridge-carpenter.

There was evidence introduced by appellant tending to show that the explosion occurred on account of the fact that the engineer placed a higher pressure of steam on the boiler than it was capable of sustaining. This tended to show negligence on the part of the engineer, and might have been looked to, in connection with the other facts, to ascertain the competency of the engineer; but a charge which presented but one fact, and that the least important fact bearing on an issue, and informed the jury that this would not be sufficient proof of incompetency, would have been calculated to mislead.

All the facts tending to show incompetency should be considered together. If the question be, whether a master exercised due care to inform himself as to the competency of a servant, evidence showing what inquiry he made, and what knowledge he had, or obtained on inquiry, should be considered; and, it would seem, if it be contended that a master knowingly employed an incompetent servant, that ought to be established by evidence tending to show that the master had been in position to know that the servant was incompetent, or the general reputation of the servant should be shown.

to be such as to induce the belief that his incompetency must have been generally known.

The court correctly instructed the jury as to the burden of proof, and as to facts necessary to be shown in order to fix liability of appellant if the injuries to appellee resulted from the incompetency of the engineer, and did not err in refusing to give the charge asked by appellant and numbered six. The other assignments relate to the refusal of the court below to grant a new trial, and in the main present questions already considered.

We deem it proper, however, to say that if there had been no testimony tending to show that the engineer was incompetent, the evidence offered by the appellee was such as to show that the boiler was unfit for use.

There is no error in the judgment, and it will be affirmed.

PRACTICE—CONTINUANCE. — Where a party has failed to employ the means provided by law, when practicable, to enforce a witness's attendance, or to procure his testimony, a continuance will not be granted for the absence of such witness, though he may be a very material witness: *Hensley v. Lytle*, 5 Tex. 497; 55 Am. Dec. 741, and note; *Hyde v. State*, 16 Tex. 445; 67 Am. Dec. 630; *Stevenson v. Sherwood*, 22 Ill. 233; 74 Am. Dec. 140; *State v. Cross*, 12 Iowa, 66; 79 Am. Dec. 519.

CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION OF FACT FOR THE JURY, and when not: See *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note; *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804, and note; and the following recent cases in which the rule that negligence is ordinarily a question for the jury has been approved and reaffirmed: *Railway Co. v. Lee*, 70 Tex. 496; *Costley v. Railway*, 70 Id. 112; *Galveston etc. R. R. Co. v. Cooper*, 70 Id. 67; *Brown v. Sullivan*, 71 Id. 470; *St. Louis etc. R'y Co. v. Burns*, 71 Id. 479; *Bueck v. Lindsay*, 65 Mich. 105; *Twohey v. Formin*, 96 Mo. 104; and in like manner is contributory negligence a question of fact for the jury: *Whalen v. Chicago etc. R'y Co.*, 75 Iowa, 563. Although it has been held that where the facts are undisputed, and such that only one conclusion can be drawn from them, then the question of negligence is one of law; still, unless an act, or a combination of acts, are denounced by statute as negligence, courts rarely feel authorized to withdraw from the jury the decision of the entire facts as to the existence or non-existence of negligence: *Texas etc. R'y Co. v. Hill*, 71 Tex. 451. But instructions of a court in an action for negligence should confine the jury to the mere consideration of such negligence only as is alleged in the complaint: *Dahlstrom v. St. Louis etc. R'y Co.*, 96 Mo. 99.

MILLIKIN v. SMOOT.

[71 TEXAS, 759.]

TENANT FOR LIFE OF PERSONAL PROPERTY IN POSSESSION has right to reclaim it when it is taken by a trespasser, and the remaindermen need not be joined as parties in an action for its recovery.

COURT MAY ALLOW OFFICER WHO TOOK DEPOSITION TO SUPPLY OMISSION therein, where it is satisfied that the deposition has not been altered.

DIFFERENT SUITS MAY BE BROUGHT FOR TWO DISTINCT TRESPASSES.

Where, therefore, a sheriff wrongfully seizes four horses from the plow and wagon of the owner, which are immediately reclaimed by the owner, and at a different time and place seizes stock-horses of the same owner on the range, the right of action for the recovery of the stock-horses is not lost by the action to reclaim the work-horses.

ACTION to reclaim personal property. The opinion states the case.

B. G. Bidwell, for the appellant.

Hood, Latham, and Stephens, for the appellee.

WALKER, A. J. This is a second appeal: 64 Texas, 172, where a statement of the case appears.

That the consideration paid for the horses — the subject of the litigation came from land limited to the wife for life, her children to take after her death — did not affect her right to the property for her life, nor to the possession of it. She had the right to reclaim the property, and it was her duty to do so. The answer of Millikin, pleading a non-joinder of parties, and insisting that her children should be made parties, was insufficient, and the exceptions to it were properly sustained. Legal title to the property was shown in the wife, coupled with possession. A trespasser could not inquire into the equities settled or charged upon the property: 5 Wait's Actions and Defenses, 471, sec. 5.

The depositions of the witness Carter were important; and had they been otherwise properly taken, upon the showing made by the notary taking them, and by the district clerk that they had not been altered, the court should have permitted the notary to remedy his oversight and write his name across the seal of the envelope, and the district clerk to indorse on the package that he had received it from the hands of the officer taking the depositions. But it appears from the bill of exceptions that the depositions had been taken without the notice to the adverse party required by the statute. This defect, properly urged, was a valid reason for suppressing them.

The action of the court in suppressing the depositions was proper.

The refusal of the court to give the instruction asked by appellant, that the claim made by appellee to four head of horses seized under the same execution with the horses sued for herein, was justified under the facts in evidence. The principle is well recognized that an aggrieved party cannot split up one cause of action into two or more suits.

The testimony shows that the horses here in litigation were stock-horses on the range, and were seized in the range. The four head of horses which had been claimed in the proceedings referred to were taken from the plow and wagon of appellee at a different time and place. It may well be presumed that the work-horses were needed upon the farm, and the prompt recovery of them was of importance. By such action the right of action for the stock-horses taken on the range was not lost. While all could have been included in one suit, the owner could pursue her rights against the two distinct invasions of her property.

The sufficiency of the testimony to sustain the verdict is not presented by any assignment of error of which the court can take notice. But an examination of the statement of facts shows that the verdict was not without evidence to sustain it.

The judgment is affirmed.

DEPOSITIONS. — It is in the discretion of the court to permit an officer who took certain depositions to amend such depositions so as to make them conform to the facts: *Chapman v. Allen*, 15 Tex. 278.

BESSO v. SOUTHWORTH.

[71 TEXAS, 765.]

PETITION IS SUFFICIENT, IN GENERAL WAY, TO APPRISE DEFENDANT OF NATURE OF CLAIM of the plaintiff, where it alleges that plaintiff has been damaged in an amount stated by the difficulty in renting his premises, and by depreciation in their value on account of the defendant's having rented a house in the vicinity thereof to lewd women as a place of public prostitution, and, in the absence of any special exception thereto, is sufficient to warrant an award of damages for a loss of rents.

PETITION SHOWS CASE FOR EXEMPLARY DAMAGES where it alleges that the defendant was notified that the establishment complained of was a bawdy-house, that he was warned in writing not to permit it to be used for such purposes, and that, subsequent to such notice, he made a pretended conveyance to the keeper of the house in order to shield himself from responsibility.

EVERY FACT NECESSARY TO RECOVERY WHICH COULD BE PROVED UNDER PLEADINGS must be considered as proved by the court on an appeal, in the absence of a statement of facts. And where the record contains no statement of facts, the appellate court cannot look to the charge of the trial court to determine whether or not there has been any evidence upon a particular issue.

IF PLAINTIFF IS ENTITLED TO RECOVER FOR INJURY TO HIS FEELINGS under the allegations of his petition, which must be presumed to have been proved upon the trial, a charge by the trial court that such injury could be recovered as actual damages, even if erroneous, is immaterial.

SUIT for injunction and for damages. The opinion states the case.

John D. Lee, and Simpkins and Neblett, for the appellants.

Beale and Antry, for the appellee.

GAINES, A. J. This suit was brought by appellee against appellant to enjoin him from permitting a bawdy-house to be kept upon certain property owned by him in the city of Corsicana, and to recover damages caused by the nuisance.

The allegations of the petition show that the defendant was the owner of a house and lot in the city, and that the plaintiff owned other houses and lots in the same vicinity, upon one of which he resided with a wife and children,—the other being used “for rental purposes”; that for two years previous to the filing of the petition the defendant had rented his house to lewd women as a place of prostitution, and that during all that time it had been occupied by his consent by such women as a place of public prostitution. It was also averred that during the time the inmates of the house, “at all hours of the day and night, had been guilty of boisterous, vulgar, and indecent conduct, in the view and hearing of this plaintiff and his family and his tenants.” It was also alleged, in substance, that the plaintiff and others had used efforts to abate the nuisance by prosecuting the inmates, by warning the defendant, and by notifying him in writing not to permit the house to be used for such purposes; and that notwithstanding this, for the purpose of shielding himself from the consequences of his conduct, he had made a deed to the keeper of the house, which was without consideration, and “a sham and fraud.” The petition also averred that by reason of the premises the plaintiff had great difficulty in renting the houses kept by him for that purpose; that they had depreciated in value, and that he had suffered a wrong and outrage to his feelings, and claimed

damages, actual and exemplary, both to his property and feelings.

The court charged the jury that if they found for the plaintiff, and awarded damages, that they would state in their verdict how much was allowed for permanent depreciation in the value of the property, how much for loss of rents, and how much for injury to the plaintiff's feelings; but also charged them that they should not give exemplary damages. The jury found for plaintiff, and gave twenty-five dollars as damages for loss of rents, and seventy-five dollars for injury to his feelings, and that there had been no depreciation in the value of his property.

It is insisted that the pleadings did not warrant an award of damages for a loss of rents, and that therefore the charge of the court instructing the jury to find such damages was error. We do not concur in the proposition. The allegations of the petition indicated that the plaintiff had been damaged by the difficulty in renting his property as well as by depreciation, and alleged his aggregate damages from this source at two thousand dollars. We think that this was sufficient, in a general way, to apprise the defendant of the nature of plaintiff's claim in these particulars, and that if he had desired a more specific allegation, he should have interposed a special exception to the petition.

It is also complained, in effect, that the court erred in instructing the jury that the plaintiff could recover for the injury to his feelings as actual damages; and the proposition is submitted that mental suffering is not an element of actual damages in such a case. There is no statement of facts in the record, and it is a general rule that, in the absence of such statement, errors assigned upon the charge of the court will not be considered: *Dewees v. Hudgeons*, 1 Tex. 192; *Birge v. Wanhop*, 23 Id. 441; *McMahan v. Rice*, 16 Id. 335; *Lewis v. Black*, 16 Id. 652; *Flanagan v. Ward*, 12 Id. 209. If it should be conceded that the proposition insisted upon is correct, then the question would arise, Has the defendant been prejudiced by the error in the charge?

Mental suffering being an element to be considered in the estimate of exemplary damages, if the pleadings and evidence made a case of such damages, the question would have to be answered in the negative. The petition does show a case for exemplary damages. It is elementary that when a recovery

has once been had for a nuisance, and it is continued, exemplary damages are allowed as a matter of course upon a second successful suit: Wood on Nuisances, sec. 855. The ground of the recovery in such case is, that the continuance of the nuisance after damages are once recovered shows "a wanton and willful invasion of another's right."

In the case before us, the petition shows that the defendant had been warned of the nature of the establishment complained of, and notified in writing to suppress it, and that he subsequently made a pretended conveyance (which was without consideration) to the keeper of the house, in order to shield himself from responsibility. Hence, if the allegations be true, he knew the nature of the house, and that it was damaging and offensive to his neighbors; and the law charges him with notice that it was unlawful. The making of the pretended conveyance showed a consciousness of his guilt and a willful determination to persist in the wrong. This, we think, makes as strong a case for exemplary damages as that of a second recovery. As to the evidence, in the absence of a statement of facts we must consider as proved every fact necessary to a recovery which could have been proved under the pleadings, unless we are to be governed as to this matter by the statement made in the charge of court, to the effect that there was no evidence to warrant a recovery of exemplary damages. But we are of the opinion that we cannot look to the charge of the court to determine whether or not there has been any evidence upon a particular issue. A statement of facts is the method provided by the statute for certifying to this court the evidence adduced upon a trial in the court below; and when this is absent, we must consider everything as proved which is necessary to sustain the verdict. If the circumstances of aggravation alleged in the petition were proved, as we must presume they were, then we think the plaintiff was entitled to recover for the injury to his feelings, and that the error of the court in charging that such injury could be recovered as actual damages becomes immaterial, if error it was. If the appellant had brought up a statement of facts, and it had appeared therefrom that a case for exemplary damages was not made by the evidence, it would have been necessary for us to determine whether the charge complained of was erroneous or not. As the record is presented, we are relieved from entering upon the discussion of that vexed question.

There being no error in the proceedings of the court below which has operated to the prejudice of appellant, the judgment is affirmed.

IMMATERIAL AND HARMLESS ERRORS: See *St. Louis etc. R'y Co. v. Mackie*, ante, p. 766, and note.

EXEMPLARY DAMAGES, WHEN PROPERLY RECOVERABLE: *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630, and cases collected in note 632; *Stutz v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and note; *Pittsburgh etc. R. R. Co. v. Lyon*, 123 Pa. St. 140; ante, p. 517, and note.

APPELLATE PRACTICE. — Every material fact not found by the court below must be presumed in favor of a judgment: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

**MUTUAL ASSURANCE SOCIETY v. SCOTTISH UNION
AND NATIONAL INSURANCE COMPANY.**

[54 VIRGINIA, 116.]

CONDITION OF INSURANCE POLICY INVOLVING A FORFEITURE will be construed most favorably to the assured and most strongly against the insurer.

NOTICE BY THE INSURER FOR THE PURPOSE OF CANCELING A POLICY cannot be given to nor served upon the mere broker or agent by whom it was obtained, though the policy declares that the person who procured it shall be deemed the agent of the insured.

LOCAL USAGE THAT NOTICE OF CANCELLATION OF POLICY OF INSURANCE SHALL BE GIVEN TO THE BROKER by whom it was obtained cannot be allowed to prevail, where the policy stipulates that notice shall be given to the assured.

USAGE IS NOT ADMISSIBLE TO CONTROL THE RULES OF LAW or to contradict the express or implied terms of a contract, or to make the rights or liabilities of the parties other than they are by the common law.

ASSUMPSIT on a policy of insurance. Judgment for the plaintiff. The defendant prosecuted a writ of error.

Kean and Guy, and R. H. Steger, for the plaintiff in error.

Pegram and Stringfellow, for the defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of the city of Richmond, rendered on the 24th of December, 1885. The facts material to be stated are, briefly, as follows: The plaintiff in error having a risk of three thousand five hundred dollars on the property of James T. Gray, procured, through Claiborne and Son, insurance brokers in Richmond, Virginia, a re-insurance in the defendant in error's

company as to two thousand dollars thereof on December 11, 1883. The said Claiborne and Son, brokers, having procured this insurance, delivered the policy to the plaintiff in error, and received the premium from them, the said plaintiff in error, and on the 11th of December, 1884, the said Claiborne and Son, at the instance of the defendant in error, procured a renewal of the said policy, and received the premium for the same from the plaintiff in error, and delivered to the said plaintiff in error the renewal certificate.

On the 17th of December, 1884, the defendant in error procured a re-insurance of their two-thousand-dollar risk above mentioned in the Niagara Insurance Company, and carried this policy to the said brokers, Claiborne and Son, to be substituted for their policy of like amount, but did not get their policy from the said brokers, because they did not have it. On the 19th of December following, the Niagara Insurance Company canceled their policy; and notice of this was given by the defendant in error to the said brokers, Claiborne and Son, and later in the day, on the said 19th of December, the fire and loss occurred.

The plaintiff in error had no notice of any of these transactions subsequent to the delivery of the renewal receipt on the eleventh day of December, 1884, and the payment by them of the premium thereon, except such constructive notice as is claimed to have been given to them through the brokers who procured the policy for them on the 11th of December, 1883. The plaintiff in error denied that the said brokers represented them any otherwise than to procure the said policy, and, denying any notice of cancellation to them before the loss, brought suit upon the policy against the defendant in error. The whole dispute in the case turned upon the question of notice of cancellation by the defendant in error; that is, whether notice of cancellation to the broker who procured the policy is notice to the insured, in a case where the broker was not the general agent of the insured, nor otherwise his agent than in such agency as arises by reason of the broker having procured the policy; it being in this case conceded that Claiborne and Son were not the general agents, nor otherwise the agents, of the plaintiff in error than such as arose through their employment as brokers to procure the policy in question.

The policy contained the following provisions: "This policy may be canceled at any time, at the request of assured, the

company retaining customary monthly short rates for the time the policy has been in force. It may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding, or tendering to the assured, or if the policy be not held by him, to the legal holder thereof, a ratable proportion of the premium for the unexpired term of the policy." And also the following provision: "If any broker, or other person than the assured or the duly authorized agent of this company, has procured this insurance, or any renewal thereof, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance."

The defendant in error did not claim that the brokers in question were the agents of the plaintiffs otherwise than as has been stated; but they proved that there was a well-established custom, or usage, in the city of Richmond, among insurance companies, brokers, and agents doing business in the said city, that whenever insurance policies were obtained through insurance brokers, all notices as to the renewal and cancellation of the same were required to be given, not to the assured, but to the broker through whom the assurance was effected. The controversy turning upon this question, both sides moved for instructions, and the court gave an instruction instructing the jury that if they believed there was such a custom, and that notice of cancellation was given to the broker who effected the insurance in this case, they must find for the defendant, and there was verdict and judgment for the defendant; whereupon the plaintiff excepted, and brought the case here by writ of error.

The construction of insurance policies often arises in this court, and has frequently and recently been the subject of consideration and judicial decision here, as well as in other appellate courts. It is well settled, as we have often said, that "the policy must be construed according to its terms; and the evident intent of the parties is to be gathered from the language used; and the court cannot extend the risk beyond what is fairly within the terms of the policy. New conditions cannot be added by the court; but the rights of the parties must stand upon the contract as made": Wood on Insurance, sec. 67, p. 177. A policy is to be construed as a whole, not literally nor severely as to either side, but accurately, so as to carry into effect the real purpose and understanding of the parties. But all conditions involving forfeitures, as well as all exemptions,

will be construed strictly, and most favorably to the assured; that is, most strongly against the party for whose benefit they are inserted: *Id.*; *Home Ins. Co. v. Gwathmey*, 82 Va. 923; *Mutual Accident Ass'n v. Newman*, 84 Id. 52; *Watertown Fire Ins. Co. v. Cherry*, 84 Id. 72, and cases cited.

The only real controversy in this case, as has been set forth, is as to the question of notice of cancellation. The policy provides for notice to the assured. The notice was to the broker who procured the policy, the policy providing that "if any broker has procured this insurance, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance." The broker was claimed, on the trial of the case, to be the agent of the insured. But this provision, having been often the subject of judicial construction in the highest courts of this country, it having been held that "a right reserved in a policy of insurance to terminate the insurance on giving notice to that effect, and refunding a ratable proportion of the premium to the assured for the unexpired term," "is not effectively exercised by the company's giving mere notice to the broker or agent of the insured through whom he procured the policy, that he desires to cancel the same." That construction of that provision was not contended for here by the learned counsel for the defendant in error.

In *Hermann v. Insurance Co.*, 100 N. Y. 411, 53 Am. Rep. 197, Judge Andrews said: "The defendant reserved the right to cancel the policy on notice to the assured. This condition would be satisfied by personal notice to the plaintiff, or to an agent authorized to receive it. But the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot in reason be held to continue after the insurance has been procured and the policy delivered to the principal. An agent to procure a contract has no power to discharge it, implied from the original authority merely. If he possesses that power, it arises from some actual or apparent authority superadded to the mere power to enter into the contract. The defendant relies upon a special clause in the policy which declares that the person who procures the policy shall be deemed the agent of the insured, and not of the company [as has been set forth above]. The obvious meaning of the clause is, that the person procuring the insurance shall, in

respect to that matter, be deemed the agent of the insured"; citing *Grace v. Central Ins. Co.*, decided in the supreme court of the United States, November 19, 1883, reported in 109 U. S. 278. See the opinion of Justice Harlan in that case, and cases cited: *White v. Insurance Co.*, 120 Mass. 330, and *Adams v. Insurance Co.*, 12 Ins. Law J. 787.

This, then, being the well-settled and conceded law on this subject, it was sought to sustain the notice in this case upon the ground that the local custom in Richmond was to notify the broker, etc., and the circuit court so instructed the jury. But this instruction violates the plainest principles of construction as set forth above. The policy required notice to be given of the desire to cancel to the assured; and the question therefore is, whether the broker was the agent of the assured for this purpose. The question is not what the local custom of Richmond is as to this notice, but what is the contract on the subject between the parties. The evidence is clear, and it is admitted that these brokers were not otherwise the agents of the insured in this case, except to procure the insurance. If, therefore, the insurers did not give notice as required by the contract, it is immaterial whether they gave notice according to the custom or not. This question is, perhaps, as well settled upon authority as the other.

In the case of *Hermann v. Niagara Fire Ins Co.*, *supra*, it is said, after saying it was the local custom of Troy to give this notice to the broker, "and, in so far as it assumes to make the broker an agent of the insured to receive notice of the cancellation, although he had no such authority in fact, it is an attempt to override the legal construction of the contract, and was inadmissible to control it."

It was said by Wright, J., in the court of appeals of New York (*Higgins v. Moore*, 34 N. Y. 425): "It is obvious that the rights of the plaintiff cannot be controlled or affected by a local usage in a particular trade. The usage is invalid, and has no binding force upon the plaintiffs. Such a usage, if sanctioned, would be to overthrow the law in the city of New York. If it prevails there, it cannot be allowed to control the settled and acknowledged law of the state. Again, the pretended usage is void, as not general, being confined to certain persons in New York, unreasonable, and against public policy. The proposition that persons engaged in a particular trade at a particular place can, by the custom or usage adopted and regulated by themselves, create a power beyond

what is actually conferred or necessarily implied, depriving an owner of his property, the possession of which he had not parted with, seems to me so fraught with mischief, as well as unsoundness, as to require only its announcement to meet with repudiation."

No usage is admissible to control the rules of law: *Wheeler v. Newbould*, 16 N. Y. 392; Judge Brown saying, in that case: "The usage to which it refers is in contradiction to the fair and legal import of the contract"; citing *Furniss v. Hone*, 8 Wend. 247; *Dykens v. Allen*, 7 Hill, 497; 43 Am. Dec. 87; *Merchants' Bank v. Woodruff*, 6 Hill, 174.

Justice Story said, in *Donnell v. Columbian Ins. Co.*, 2 Sum. 377: "I am among those judges who think usages among merchants should be very sparingly adopted as rules of law by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles."

Judge Dewey said, in *Clark v. Baker*, 11 Met. 189, 45 Am. Dec. 199: "Usages of this character [local usages of trade] are only admissible upon the hypothesis that the parties have contracted with reference to them. If the parties make express stipulations as to the terms of a sale, or the manner of the performance of a contract, or state the conditions upon which it may be rescinded, such express stipulations must be taken as the terms of the contract, and they are not to be affected by any usage contrary to them."

Lord Lyndhurst, C. B., said, in the case of *Blackett v. Royal Exchange Assurance Co.*, 2 Tyrw. 273: "The objection to the parol evidence is, that it was not to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent; but that it was at direct variance with the words of the policy, and in plain opposition to the language it used. We are therefore of opinion that the evidence of usage was properly rejected."

In *Bradley v. Wheeler*, 44 N. Y. 503, it was said: "As to the admissibility of usages in general, the later cases show that the dislike to them which seems always to have characterized the ablest judges in this country, and particularly in this state, is now becoming general, and it is now quite well settled that usage or custom cannot be proved to contravene a rule of law, or to contradict the express or implied terms of a contract, or to make the legal rights or liabilities of the parties to a con-

tract other than they are by the common law. Here there was no uncertainty as to the terms of the contract. Hence the custom offered to be proved would have contradicted or varied the terms of the contract, and was therefore inadmissible."

In *Hinton v. Locke*, 5 Hill, 437, Bronson, J., said: "Usage can never be set up in contravention of the contract. When the agreement contains any express terms on the subject, evidence of the custom shall be excluded." *Expressum facit cessare tacitum*: *Clarke v. Royston*, 13 Mees. & W. 752; *Roberts v. Barker*, 1 Crompt. & M. 808. Promises in law exist only in the absence of express promises. A party, therefore, cannot be bound by an implied contract when he has made an express contract as to the same subject-matter: Chitty on Contracts, 85; *Selway v. Fogg*, 5 Mees. & W. 83; *Ferguson v. Carrington*, 9 Barn. & C. 59.

Lastly, it must be remembered that no custom, however universal or old or known, unless it has actually passed into law, has any force over parties against their will. Hence in the interpretation of contracts, it is an established rule that no custom can be admitted which the parties have seen fit expressly to exclude. And not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by necessary implication, as by providing that the thing which the custom affects shall be done in a different way; for a custom can no more be set up against the clear intention of the parties than against their express agreement, and no usage can be incorporated into a contract which is inconsistent with the terms of the contract: 2 Parsons on Contracts, 546. We have said that this question is, perhaps, as well settled upon authority as any question arising in this case, and considered above, and our investigations lead us to the conclusion that citations might be indefinitely extended.

But we will conclude the discussion of this question by citing the clear and satisfactory conclusions of Mr. Justice Story in the case of *The Schooner Reeside*, 2 Sum. 569, in which, in speaking of what he terms the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law, he said: "But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and

a fortiori not to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written or express contract cannot be controlled or varied or contradicted by a usage or custom."

Upon reason as well as upon authority, it is clear that under the contract in this case the notice of a desire to cancel the same was to be given to the assured. This is the express stipulation in the policy itself "to the assured." The notice was not given to the assured, nor to a person authorized to receive notice for the company. Notice was neither given to the assured nor to any agent of the assured, and it follows that there was no notice of a desire for cancellation before the loss occurred. The assured in this case was another insurance company; but the principle is the same as when an individual is the assured. We think the circuit court of Richmond erred in instructing the jury, as we have seen, on the question of notice of cancellation; that it should have instructed the jury in this case that no notice of cancellation was given to the company by giving such notice to a broker not authorized to receive it; and the judgment appealed from will be reversed and annulled.

Judgment reversed.

CONSTRUCTION OF INSURANCE CONTRACTS. — Insurance policies are construed in favor of the assured and against the insurer: *Western Ins. Co. v. Cropper*, 32 Pa. St. 351; 75 Am. Dec. 561, and note 563. The same rules are followed in the construction of insurance contracts as in other contracts: *Home Ins. Co. v. Gwathmey*, 82 Va. 923. Where two constructions can be placed upon an insurance contract, it is a well-settled rule that the one most beneficial to the insured will be adopted: *United States Mut. Acc. Ass'n v. Newman*, 84 Id. 58; *Watertown Ins. Co. v. Cherry*, 84 Id. 75.

CANCELLATION OF INSURANCE POLICY. — Notice of cancellation given to the brokers through whom the assured procured his policy is not notice to the assured: *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411; 53 Am. Rep. 197.

CUSTOM AND USAGE. — Usage and custom cannot be proven to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, nor to make the legal rights or liabilities of the parties to a contract other than they are by the terms of the contract: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771, and note 775; but local usages of trade, if reasonable, and so generally adopted by persons engaged in a particular branch of business as to raise the presumption that they are known to all persons in that business, are valid, and contracts made in that business will be deemed made with reference to them, unless there are stipulations to the contrary: *Clark v. Baker*, 11 Met. 186; 45 Am. Dec. 199, and note 202. Parties to contracts are presumed to contract with reference to a

uniform and well-established custom and usage pertaining to matters concerning which they make the contract, provided such usage and custom is not in opposition to well-settled rules of law, and is not unreasonable: *Smythe v. Parsons*, 37 Kan. 79.

RICHMOND AND DANVILLE R'Y Co. v. NORMENT.

[84 VIRGINIA, 167.]

MEASURE OF DAMAGES. — WHERE ONE HAS BEEN INJURED BY THE NEGLIGENCE OF ANOTHER, the jury, in estimating the damages, may take into consideration his physical and mental suffering arising from the injury, his medical expenses in getting his injuries healed, his loss of wages for the time he was prevented from working, and proper compensation for his being deprived by the injuries from following such calling or business as he could have otherwise followed.

MASTER AND SERVANT. — EMPLOYEE CONTINUING TO WORK AFTER HE KNOWS OF THE NEGLIGENT and dangerous manner in which his employer allows his business to be conducted does not assume the risk of such negligence, and may recover of his employer if injured thereby.

MASTER IS BOUND TO USE ORDINARY CARE IN SUPPLYING AND MAINTAINING PROPER INSTRUMENTALITIES for the performance of the work required, and generally to provide for the safety of his servant in the course of the employment to the best of his skill and judgment.

CO-EMPLOYEES, WHO ARE NOT. — One employed to overhaul or repair railway cars is not a co-employee with a conductor or engineer of a shifting engine, when he is not under the orders of nor of the same grade nor line of duty with either.

MASTER AND SERVANT. — RAILWAY COMPANY IS GUILTY OF NEGLIGENCE, AND LIABLE TO ITS EMPLOYEE injured thereby, when it puts him to work overhauling or repairing a car, where it is necessary for him to be between two cars, and it causes another car to be shifted on the same track and driven against that on which he is at work, without giving any previous warning.

ACTION of trespass on the case for injuries alleged to have been suffered by the plaintiff from the neglect of the defendant. The circumstances under which plaintiff was injured are stated in the opinion. At the request of plaintiff, the court gave his instruction No. 2, as follows: "2. The court instructs the jury that if they should find for the plaintiff, they may, in estimating the damages, take into consideration his physical and mental suffering arising from said injury, his medical expenses in getting his injuries healed, his loss of wages for the time that he was prevented by said injuries from working, and proper compensation for his being deprived by the said injuries from following such calling or business as he could have followed but for said injuries." The defendant asked for instructions Nos. 1, 2, and 3, as follows: "1. That if the

jury believe, from said testimony, that the plaintiff worked as overhauler in the yard of the defendant at Richmond, in which there were numerous railroad tracks on which freight and other cars were being often moved about by the shifting-engine used for that purpose, to wit, cars that were moved from one point to another, as occasion required, some to be loaded, some to be unloaded, some to be placed upon a track in the yard, so that the overhaulers might make necessary repairs and the greasers could grease them, and that this shifting and moving the shifting-engine and cars for the purposes aforesaid, and also for the purpose of making up trains, so often going on during both day and night with the knowledge of the overhaulers, the said shifting-engine being used only for the purposes aforesaid, and for the purpose of carrying to the Manchester yard of said defendant, just on the opposite side of James River from Richmond, cars requiring more than ordinary repairs, or cars sent there for other purposes, and that its principal business was shifting cars and trains in the yard at Richmond, where the overhaulers worked, and all this with the knowledge of the overhaulers themselves; that the conductor, the manager of the shifting-engine and the engineer thereof, and the overhaulers aforesaid, were co-employees; and if the jury believe that the plaintiff sustained the injury complained of by reason of the negligence of the conductor or engineer of the shifting-engine,—he cannot recover, unless the jury believe, from the evidence, that the conductor or engineer, one or both, were incompetent to discharge the duties properly of the position they respectively occupied, and that the defendant had knowledge of such incompetency.

2. That if the jury believe, from the evidence, that if the plaintiff had acted in such manner as any prudent person would have acted under the same circumstances, and that if he himself had not acted so imprudently, he would not have received the injury he sustained, he is not entitled to recover, although they may believe, from the evidence, that the conductor or engineer of the shifting-engine may also have acted negligently.

3. If the jury believe, from the evidence, that the plaintiff, when he went into the employment of the defendant as an employee to work in its Richmond yard as greaser of cars and overhauler of cars, had an opportunity, after being there for one month or more, to familiarize himself with the manner in which the shifting of cars with the shifting-engine was carried on, and with the means used to avoid accidents, and did not

complain to the defendant, or any of its agents, of the said manner in which the operations were carried on, but with the full knowledge of the manner of conducting said operations, continued voluntarily in such employment, he cannot recover in this action for the injury he sustained, although such injury may have resulted from the negligence of the conductor and engineer, or either, of the shifting-engine, his co-employees, if the jury believe they were competent and fit persons for the discharge of the duties of the respective positions they held; or that if they were not, that the defendant knew, or by the proper exercise of care ought to have known, that the engineer and conductor were, or one of them was not, competent or careful." The court refused these instructions, and at its own instance, instructed the jury as follows: "The jury are instructed that the defendant is not responsible to the plaintiff for injuries resulting from the negligence of either Robinson or Teller, unless they believe that he was not competent for or careful in the discharge of the duties assigned him, and that the defendant either knew, or by the exercise of proper care ought to have known, that he was not competent or careful. But if the jury shall believe that the defendant had failed to exercise all reasonable care and caution in its instructions to and control of Robinson and others, employees in the yard, and in furnishing them with and requiring them to use all means and appliances reasonably necessary for the protection of its employees while engaged in such work as the plaintiff was engaged in when injured, they should find for the plaintiff, unless they further believe that the plaintiff contributed to the accident by his own failure to exercise such care and caution as an ordinarily prudent man, with his knowledge, or opportunities of knowledge, of the danger, ought to have exercised for his own protection; in which event, they should find for the defendant." The defendant excepted to the instructions given by the court, and also to the action of the court in refusing to give instructions as requested by it. The jury returned a verdict for the plaintiff. The defendant then moved to set aside the verdict, and for a new trial. The motion was refused and judgment entered upon the verdict, and defendant thereupon obtained a writ of error.

H. H. Marshall, for the plaintiff.

Meredith and Cocke, for the defendant.

RICHARDSON, J. The defendant, the plaintiff in error here, excepted to the instruction given at the instance of the plaintiff, which was the plaintiff's instruction No. 2, but assigned no defect therein, and could not have done so, as it was plainly proper, and upheld by reason and authority.

As to the instructions asked for by the defendant and refused by the court, the first two are covered by those given by the court, which, in substance, are the same, only more directly and strongly expressed; so that, whether they were right or wrong, it is not necessary to consider, as it is certain that the defendant was not aggrieved by the court's substitution. The defendant's first instruction tells the jury that, if they believe certain facts from the evidence, then the conductor and the engineer of the shifting-engine, by whose acts the plaintiff was injured, and the plaintiff, were co-employees, and that if the jury believe, from the evidence, that the plaintiff sustained the injury complained of by reason of the negligence of said conductor and engineer, he cannot recover, unless the jury believe, from the evidence, that the said conductor and engineer, or either of them, were incompetent to discharge properly the duties of the positions they respectively occupied, and that the defendant had knowledge of such incompetency.

Yet the first instruction given by the court assumes that the conductor and the engineer were co-employees with the plaintiff, and tells the jury downright that the defendant is not responsible for injuries resulting to the plaintiff from their negligence, unless, etc.

The third instruction of the defendant is to the effect that an employer is released from all liability for negligence, although aware of its continued existence, if the injured employee continued to work for him after he knew of the negligent and dangerous manner in which the employer allowed his business to be conducted. The court did not err in rejecting this instruction. It was palpably improper. It is sanctioned neither by reason, justice, nor law. The usual and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those in his employment. It is a cruel—an inhuman—doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees, who, serving him under such circumstances, are injured by his negligent acts and

omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself.

The second instruction of the court correctly propounds the law of the case. It is sustained by an unbroken line of authorities, in none of which is it more clearly expressed than *B. & O. R. R. Co. v. McKenzie*, 81 Va. 71, where Lewis, P., says: "The master, to be exempt from liability, must himself have been free from negligence. He is bound to use ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required, and generally to provide for the safety of the servant in the course of the employment, to the best of his skill and judgment. And if he fail in the performance of his duty in this particular, he is liable to the servant as he would be to a stranger"; citing *Hough v. Railway Co.*, 100 U. S. 213; *Wabash R'y Co. v. McDaniels*, 107 Id. 454; 2 Thompson on Negligence, 985, 986. We are therefore of opinion that said circuit court committed no error in respect of its rulings as to said instructions of which the plaintiff in error can complain.

It is also assigned for error that the circuit court overruled the defendant's motion to set aside the verdict of the jury and award a new trial, on the ground that the verdict was contrary to the law and the evidence.

The evidence as certified discloses the following facts: S. F. Norment, the defendant in error, was, on the 2d of March, 1885, employed by the defendant company, the plaintiff in error here, at its Richmond depot-yard as an "overhauler,"—that is, to assist in fixing up cars needing repairs. Two men called inspectors go over the cars ahead of the overhaulers and see what is to be done to them. They set down on a piece of paper the number of the car, and what is to be done to it, and hang the paper up on file in what is called "the overhauler's shanty," and the men who do the overhauling come into the shanty, examine the paper, learn what is required of them, and at once proceed to do it. On the day he received the injury in question, Norment was required to put a draw-bar spring into the end of a certain car which stood on "the branch-track." He undertook to perform this duty, aided by one Garrett, another overhauler, the job requiring two. The

car thus to be fixed was one of the intermediate ones of a line of cars standing on said track in said yard. One car was in front and several behind the damaged car to be overhauled. To do the job, it was necessary for Norment to get under the damaged car, and for Garrett to get between it and the one in front of it. Having so placed themselves, they removed the old spring, and began to put in the new one. The cross-head fitted tight, and required both men to fix it,—one to drive it up, and the other to head it. Norment held it to place the spindle in the seat, and Garrett proceeded to drive it up. Whilst they were so situated, the company caused another car to be shifted onto the branch track, and driven against the car which stood in front of the one they were at work on. That caused the car in front of the damaged car to be driven against the latter car, and caused the hand of Norment that held the spindle to be caught between the draw-bar and the spring-seat, and to be greatly mashed. The injury caused the loss of the first finger and the first joint of the second. The injury also caused the hand to rise, and it had to be lanced. The result was, that the whole hand was rendered permanently stiff and disabled. The company owned an engine called the “shifting-engine,” used to shift cars from one track to another, and to and from the Manchester yard. In the performance of these duties, the shifting-engine was generally employed all day. It was run by an engineer who did the shifting according to orders given him by the shifting conductor. Nothing was done except by the orders of this conductor. The car which was shifted upon the branch track where Norment was at work was ordered to be so shifted by the conductor. There was no repair track in this yard. A repair track is one upon which cars needing repairs are put, and upon which it is not customary for the shifting-engine to come without notice to the overhaulers at work there. With such a track, overhaulers can do their work without being subjected to unnecessary danger. The company knew of the necessity for such a track, because they have such a track in their Manchester yard. The company had adopted and provided, up to the time of this injury, no means whatever whereby overhaulers could be protected when at work upon a car. Even when complaint was made of the want of protection, they were told to look out for themselves. In this Richmond yard, the company not only failed to have a repair track as a means of safety to overhaulers, but failed to provide

another simple and cheap safeguard, — that is, signal-flags. A flag in the end of the bumper of the first car to notify the conductor of the shifting-engine that some one is working under the car, is the usual means of protection given to overhaulers. The company recognized the necessity for them before the injury, for they used them before the injury, in the Manchester yard. After Norment was injured, the company showed its knowledge of the necessity for signal-flags, and had them put into use in the Richmond yard.

The company undertook to prove to the jury that before an overhauler should go under a car to work, it was his duty to notify the conductor or engineer of the shifting-engine.

At the time of the injury, Norment was not of the same grade or same line of duty as Teller, the engineer, or as Robinson, the conductor, of the shifting-engine; nor was he under the orders of either of them. He was under the orders of Newcome, the foreman of overhaulers and greasers. Teller and Robinson were in the transportation department of the company, and subject to the orders of West, the master of transportation. So Norment was not a co-employee with Teller and Robinson in the sense which relieves the employer from liability for an injury done to one employee by the negligence of his co-employees. But the court below instructed the jury expressly that Teller and Robinson were co-employees with Norment, and that the company was not liable to Norment for an injury resulting to him from their negligence. Such instruction was palpably erroneous. It was in direct opposition to the doctrine laid down by this court in *Moon's Adm'r v. R. & A. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401, where it was held that a section-master in charge of a squad of hands altering and repairing the road could, in no sense, be regarded as the fellow-servant in the same common employment or department of service with the person injured, who was a train-hand and brakeman, — hence they were not co-employees thrown together in the performance of a common duty, and having opportunity to observe and judge of the habits and qualifications of each other. The doctrine laid down in that case was reaffirmed by this court in the case of *B. & O. R. R. Co. v. McKenzie*, *supra*, and is in full accord with *Railroad Co. v. Ross*, 112 U. S. 377.

It cannot be questioned that the injury to Norment was caused by the negligent act of Robinson, the conductor, in shifting the car on the branch track, where Norment was at

work in the regular course of his duty, and in cutting that car loose upon that track, and in causing it to strike against the car which stood on that track in front of the car under which Norment was engaged in fixing the draw-bar spring, as he was directed to do by his superior; and that in so doing without first taking pains to ascertain whether there was any person under that car, was negligence for which the company is responsible.

In *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455, it was held to be negligence for which that company was liable that the obvious precaution was neglected of making an examination before the stationary flat at Howell's was set in motion, to see if there was any one or anything under or near the car which could be injured by its being put in motion.

For these reasons, we are of opinion that the circuit court did not err in overruling the motion of the defendant (plaintiff in error here) to set aside the verdict and grant a new trial, and that the judgment complained of must be affirmed, with costs to the defendant in error.

From the foregoing opinion, FAUNTLEROY, J., dissented. He claimed that the court's instruction was ambiguous and contradictory, and therefore calculated to mislead the jury in this: that it declared that defendant was not responsible for injuries resulting from the negligence of either Robinson or Teller, unless they believed that he was not competent for or careful in the discharge of the duties assigned him; that the words "not careful in the discharge of duties assigned him" is negligence, and therefore the proposition to the jury was, "that the defendant is not responsible to the plaintiff for injuries resulting from the negligence of either Robinson or Teller, unless they believe he was [negligent] not careful."

He further criticised the instructions because the jury were not told, in direct terms, to found their belief upon the evidence; and he insisted that the use of the words "if the jury believe" was not sufficient to impress upon them the fact that their belief must be based upon the evidence received by them.

Upon the question who are fellow-servants, the principal case is in harmony with *Ayers v. R. & D. R. R. Co.*, 84 Va. 679, and *Johnson v. R. & A. R. R. Co.*, 84 Id. 713, in both of which a recovery was had for injuries received by a brakeman through the negligence of his conductor.

MEASURE OF DAMAGES IN PERSONAL INJURIES, ELEMENTS OF: *Central Pacific R'y Co. v. Kuhn*, 86 Ky. 578; 9 Am. St. Rep. 309, and note 318; *Alabama etc. R. R. Co. v. Yarbrough*, 83 Ala. 238; 3 Am. St. Rep. 715, and note 718; *Clapp v. Minneapolis etc. R'y Co.*, 36 Minn. 6; 1 Am. St. Rep. 629, and note 632. It is now well settled that mental suffering is an element of damages, where serious bodily injury is inflicted; and when such injury is liable to produce permanent disability, and continues for a long time, suffering, both mental and physical, may be taken into consideration by the jury in assessing the damages: *Brown v. Sullivan*, 71 Tex. 470; compare *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note 344.

FELLOW-SERVANTS, WHO ARE: See *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note 342, 343; *Sullivan v. Tioga R'y Co.*, 112 N. Y. 643; 8 Am. St. Rep. 793, and note 796; *Hussey v. Coger*, 112 N. Y. 614; 8 Am. St. Rep. 787, and note 793; *McMaster v. Illinois Central R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note 657; *East Tennessee etc. R. R. Co. v. De Armond*, 86 Tenn. 73; 6 Am. St. Rep. 816, and note 820; *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note 664; *Krogg v. Atlanta etc. R. R.*, 77 Ga. 202; 4 Am. St. Rep. 79, and note 84; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note 142; *Lewis v. Seifert*, 116 Pa. St. 628, and note 638; *Smith v. Wabash etc. R'y Co.*, 92 Mo. 359; 1 Am. St. Rep. 729, and note 739; *Fisk v. Central Pacific R'y Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and monographic note 28-33. A foreman having charge of his employer's men, who are subject to his orders only, is not their fellow-servant with respect to orders given: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336. A married woman cooking on a construction train, occupying a car, boarding train-hands in railway service, paid by the railway company, is not a fellow-servant with the employees running the train: *Brown v. Sullivan*, 71 Tex. 470. Engineers and brakemen are fellow-servants of section-hands and track-men: *Connelly v. Minneapolis E. R'y Co.*, 38 Minn. 80.

DUTY OF MASTER TO SUPPLY SAFE MACHINERY, ETC., FOR HIS SERVANTS: See *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311, and note 328; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153; 5 Am. St. Rep. 832, and note 836; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note 264. It is the duty of an employer to use ordinary care and reasonable skill to make safe the place where he requires his employees to do their work: *Brazil B. Coal Co. v. Young*, 117 Ind. 520. The master need not furnish the very best known appliances; he is required only to furnish such as are reasonably safe, and to see that there is no defect in those which he requires his servants to use: *Strongham v. Hilton*, 111 N. Y. 188. But a master is not chargeable because of the designation of the place of work, made dangerous by the carelessness and negligence of fellow-servants, or for the negligent manner in which his servants use the tools and appliances furnished them: *Hussey v. Coger*, 112 N. Y. 614; 8 Am. St. Rep. 787. Where the duty rests on the master to provide safe appliances, such as are usually used in similar lines of work, the servant takes all the risks involved in the work of his own and his fellow-servants' negligence: *Hudson v. Ocean S. S. Co.*, 110 N. Y. 625; but the mere knowledge by a miner that his master has failed to provide a mine with the protections required by statute will not defeat an action for the recovery of damages occasioned by such failure: *Durant v. Lexington Coal Co.*, 97 Mo. 62.

EFFECT OF SERVANT CONTINUING IN MASTER'S EMPLOY AFTER KNOWLEDGE OF DEFECTS: See *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note 343; *Fisk v. Central Pacific R'y Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 28; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note 264; *Gulf etc. R'y Co. v. Donnelly*, 70 Tex. 371; 8 Am. St. Rep. 608, and note 610; *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note 592. A servant necessarily assumes the risk only of such hazards as are apparently incidental to an employment intelligently entered upon; and if he is aware that proper precautions have not been taken for his safety, and still remains in his master's service notwithstanding the risk, he will be considered as having assumed the responsibility of his own security: *Smith v. Sellers*, 40 La. Ann. 527; *Appel v. Buffalo etc. R'y Co.*, 111 N. Y. 550.

TRICE v. KAYTON.

[84 VIRGINIA, 217.]

COVENANT OF SEISIN AND FOR QUIET ENJOYMENT IS BROKEN IF THE LOT CONVEYED AND PART OF THE BUILDINGS THEREON ENCROACH ON A PUBLIC STREET, on account of which the grantee is obliged to pull down part of such buildings and repave the street, if the fact of such encroachment was not known to the grantee when the deed was made.

ACTION for breach of covenant. Judgment for plaintiff. Defendant prosecuted writ of error.

R. M. Hughes, for the plaintiff.

Borland and Willcox, for the defendant.

LACY, J. This is a writ of error to a judgment of the corporation court of Norfolk City rendered on the twenty-eighth day of October, 1886. The case is as follows: On the thirteenth day of December, 1878, the plaintiff in error sold to the defendant in error a certain lot and buildings thereon in the city of Norfolk. The deed was with general warranty, and contained a covenant of seisin, and for quiet enjoyment free from all encumbrances, etc. On the twentieth day of October, 1878, the city inspector of streets of said city notified the defendant in error that her fence and buildings encroached on the street, and ordered her to remove them. This order not being obeyed, in January following the notice and order were repeated, with a copy of the ordinance of the city providing for a fine if the order was not obeyed. The defendant in error notified her vendor, the plaintiff in error, and the said vendor refusing to concern himself about the matter, the said defendant in error proceeded to obey the order of the city authorities, and pulled down and removed a part of her buildings, and repaved the street on the part vacated, and instituted her action of covenant for breach of the warranties in the deed of her grantor. On the trial of the action, it was proved that the house in question was built by direction of the city engineer at that day, which appeared to the present engineer to be erroneous. It appeared in evidence that the buildings in question encroached on the street three feet eight inches, if the street was preserved of uniform width, which was forty feet. Both sides asked instructions, and the court, rejecting the defendant's instructions, gave the plaintiff's instructions; thereby instructing the jury that if they believed, from the evidence, that the deed of the defendant purported to convey

the land in question, and that it was a part of the highway, that such fact constituted a breach of the covenants in the deed, and the plaintiff was entitled to recover, and other instructions as to the measure of damages, and there was a verdict for the plaintiff. The defendant moved to set aside this verdict, and grant a new trial, but the court overruled the motion, and rendered judgment on the verdict; whereupon the case was brought here by a writ of error by the defendant, who had duly excepted, in the progress of the case, to the rulings of the court against him.

The chief question involved here, and the only one it is necessary to notice, is, whether the facts set forth above constitute a breach of the covenants in the deed. It is contended by the plaintiff in error that a taking of part of the land for this street was not a breach of any warranty contained in the deed. The question whether the extension of a highway through or over any part of a lot of real estate is a breach of the covenant of quiet possession free from encumbrances seems to have been much controverted; and it has been held that a public highway or a railway in actual use is no breach of the covenant against encumbrances, nor a public or semi-public alley which is open to public observation. But whatever weight, says Mr. Rawle, may be due to these decisions, it cannot be denied that the current of authority has set strongly the other way; and the ruling in *Kellogg v. Ingersoll*, 2 Mass. 97, has been approved and sustained in nearly all the New England states and many others, in which it appears to be definitely settled that a public highway does constitute at law a breach of this covenant: Rawle on Covenants, secs. 79, 80 et seq. In the case of *Kellogg v. Ingersoll*, *supra*, Parson, C. J., said: "It is a legal obstruction to the purchaser to exercise that domain over the land to which the lawful owner is entitled. An encumbrance of this nature may be a great damage to the purchaser," etc. In the case of *Jordan v. Eve*, 31 Gratt. 1 (opinion of Staples, J.), the decision is placed upon the ground that the highway was known to the purchaser, and taken into consideration when the purchase was made, and was obviously included in the contract between the contracting parties. In such case, the highway cannot be held to constitute a breach of the covenants of the deed. But while approving that decision, we think it must be distinguished from this case. Here a certain lot by metes and bounds was sold for an agreed price, with buildings standing thereon, with

the covenants stated. The purchaser not only lost control of a part of this land, but his house standing in the street in part, it had to be pulled down. The street was obvious and observable, of course; but the hidden fact, which afterwards transpired, that, according to the true measurements of the street, the house stood upon a part of the highway, was not observable, in no wise apparent, and could not have been in contemplation of the parties contracting together. The purchaser was disturbed in the quiet possession he had contracted for, and deprived of a part of his house altogether, and of exclusive possession of a part of the land he had purchased. We cannot but regard this as a breach of the covenants in his deed for quiet possession. The case of *Wilson v. Cochran*, 46 Pa. St. 229, turns upon the same question as the case of *Jordan v. Eve*, *supra*, so far as the existence of a known public highway is concerned. In the case of *Butler v. Gale*, 27 Vt. 739, it is held that a highway, however open and obvious, intersecting land sold will constitute a breach of the covenants against encumbrances, unless especially excepted in the deed; but from this doctrine we withhold our sanction, and it appears now to have been corrected in that state by statute. In this state, the law is settled the other way; but in a case like the one at bar, where the encumbrance is not known, and can in no way be held to enter into the contract, we think the extension of the highway is a breach of the covenants in the deed. The conclusion therefore is, that there is no error in the judgment appealed from, and the same must be affirmed.

COVENANTS OF SEISIN AND FOR QUIET ENJOYMENT. — Covenant of seisin is broken at the moment of its execution, if the grantor is not at the time lawfully seised: *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338. It is not necessary that there should be an actual eviction by process of law to constitute a breach of the covenant of title and quiet enjoyment, for such covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible title, whether that title be established by judgment or not: *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456. When land conveyed with a covenant of quiet enjoyment is in the possession of another under a paramount title, who keeps out the grantee, the covenant is broken: *Shattuck v. Lamb*, 65 N. Y. 499; 22 Am. Rep. 656. Where defendant conveyed to plaintiff by a deed containing a covenant of seisin land which was occupied by a railway, the covenant of seisin was not broken, although the covenant against encumbrances was: *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426. Compare *Dickson v. Desiré*, 23 Mo. 151; 66 Am. Dec. 661, and note 670; *Surget v. Arighi*, 11 Smedes & M. 87; 49 Am. Dec. 46, and note 49; note to *Morse v. Garner*, 47 Am. Dec. 570, 571.

CRAWN v. COMMONWEALTH.

[84 VIRGINIA, 282.]

APPLICATION OF PAYMENTS BY PUBLIC OFFICER IS BINDING ON HIS SURETIES, and they cannot escape liability for his failure to pay over money collected during the term for which they were sureties by showing that he wrongfully applied such moneys to the payment of deficiencies occurring during the preceding term.

SURETIES ON AN OFFICIAL BOND are not released from liability by the failure of other officials to exact settlements of their principal at the times prescribed by law.

ACTION against the county treasurer and his sureties on his official bond. Judgment for the plaintiff. The defendant appealed.

John E. Roller, for the plaintiff.

R. A. Ayers, attorney-general, and *W. R. Meredith*, for the defendant.

LACY, J. At the trial, the plaintiff proved that there was a balance due the state of Virginia from the treasurer of the county of Rockingham, Samuel R. Sterling, upon the revenue and license tax of 1885, the sum of \$19,750.98. The defendant thereupon offered to prove on his part that S. R. Sterling was treasurer of Rockingham County for three successive terms,—the first beginning July 1, 1875, and continuing four years, the second beginning July 1, 1879, and continuing four years, the third beginning July 1, 1883, and continuing to the — day of December, 1885, when he resigned his office, and that a bond was given at the commencement of each term, and a new bond executed on the motion of one of his sureties during his second term of office; that the first and second bond was for one hundred and fifty thousand dollars, the new bond given during the second term was for one hundred and fifty thousand dollars, and at the commencement of the third term a bond was given for one hundred and forty thousand dollars; that the sureties on these several bonds were, in some instances, different persons; that the said Sterling was a defaulter to the state of Virginia during his first term; that such default occurred in 1878, and amounted to at least thirty-five thousand dollars; that this default continued up to December, 1885, when said Sterling resigned his office as treasurer; that the collections made by said treasurer of revenues and taxes of each year succeeding the year 1878 were taken by him to make good the deficiency previ-

ously existing; that the successive auditors of the state failed to comply with the provisions of section 31, chapter 60, Acts of 1878-79, and the same section of act of general assembly of March, 1875; that the supervisors of Rockingham County also failed to make settlements with said treasurer as required by law, or to require him to make exhibits of his accounts as treasurer with the county, and of the moneys, books, and papers in his hands belonging to said county; that said Sterling was a defaulter to said county in 1878 in not less than twenty thousand dollars, and continued such defaulter up to the time of his resignation; that if either the auditors or board of supervisors had discharged their duties as required by law, in regard to the accounts of said treasurer, the defaults aforesaid would have been discovered and made known; that said defaults were not known to the sureties upon the bond of 1879 and the bond of 1883, and that said sureties would not have gone on said bonds if they had had any intimation that any default had previously occurred; that one of the sureties died in December, 1883, and another died in August, 1880; that the estates of each, for the most part, had been paid out to creditors and distributees widely scattered in various states, and some of them insolvent, before the institution of this suit, in complete ignorance of any liability on the bonds of Sterling, treasurer, as aforesaid. But the court refused to permit the introduction of said testimony, or any part thereof, whereupon the defendant excepted, and judgment being rendered for the said plaintiff, as aforesaid, the defendant brought this case here by writ of error; and the said action of the said circuit court of Richmond City, in excluding the said evidence so offered by the said defendant, is assigned as error here.

Did the evidence offered by the defendant constitute any valid defense to the action? The application of the payments made by Sterling above stated was made by the creditor by the direction of the principal debtor. In a similar case upon this point, decided by this court in 1875 (*Chapman v. Commonwealth*, 25 Gratt. 721), Moncure, P., delivering the unanimous opinion of the court, so far as this point is involved, said: "Scott owed two debts to the commonwealth, for which different sets of sureties were liable. He made payments to the auditor on account of these different debts at different times, which payments were applied by the auditor according to the direction of the debtor. This was perfectly proper, if the auditor acted fairly, and it is not pretended that

he did not; certainly there is no evidence in the record tending to prove that he did not. If he had known that money applied by Scott to the payment of a debt for which his sureties as collector were not liable was derived from the collection of revenue collected by him under the bond in which they were sureties, they might have had just ground of complaint. But he had no such knowledge, and the money had no ear-mark. The law is well settled, that a man owing two debts to the same creditor, and making a payment to the creditor, may apply it to either of the debts as he pleases. If the debtor fail to make the application, the creditor may make it as he pleases; and if both fail to make it, the law will make it according to the circumstances of the case; and in the absence of any other controlling circumstances, the payment will be applied first to the older debt. In this case, the application was made by the concurrent act both of the principal debtor, who made the payment, and the creditor. The payments made by Scott on account of the revenue of 1870 were, at least, without any direction of Scott to the contrary (and there was none), properly applicable to the payment of what he had collected in the order in which it was collected, on the principle before stated; thus leaving due that portion of the revenue for which the sureties of the collector were clearly liable."

This case seems to be decisive of the case at bar on the question of the appropriation of payments, and we do not consider that the citations by the learned counsel from De Colyer on Guaranties, and his citation of cases, affect this question. There was no connivance of fraud on the part of the auditor suggested in either instance. The application of payments as made by them seems to have been in accordance with the settled law upon the subject.

Upon the suggestion that time was given by the several auditors, and that suit was not brought, as the law required, upon the failure of the debtor to pay promptly, it is not charged that there was any fraudulent concealment on the part of the auditors of the true facts in each case; and it is admitted that diligent inquiry on the part of the defendants would have disclosed to them the true condition of affairs at any time; so that the defense in this regard amounts to the claim that there was indulgence on the part of the state,—an extension of time to the debtor. In the case of *Smith v. Commonwealth*, 25 Gratt. 780 (which was a case where the surety

of a treasurer who had defaulted to the state claimed to be discharged of his obligation by the act of assembly which extended the time of payment by the debtor, and thus enabled him, as was alleged, to default by postponing the time of discovery of his delinquencies), the court said: "In the case of *Commonwealth v. Holmes*, 25 Gratt. 771, this court held, upon abundant authority, that the regulations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, were directory merely, and did not enter into and form part of the sureties' contract, so as to prevent the legislature from altering or extending the times of settlement at pleasure without the sureties' assent; and therefore, and from the nature of the officer's obligation and duties, and of the condition of the bond, such an extension did not operate as a discharge of the surety. We reaffirm that principle, and are of opinion that the sureties in this case are not discharged from liability for the official acts of their principal by reason of the extension of time for settlement granted to him," etc.

In the case of *United States v. Kirkpatrick*, 9 Wheat. 720, Mr. Justice Story, delivering the opinion of the supreme court of the United States, said these regulations as to settlements, "are provisions of law created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract of the surety." These provisions are merely directory to the officers, and intended for the security and protection of the government, by insuring punctuality and responsibility, but they form no part of the contract with the surety: *United States v. Van Zandt*, 11 Id. 184; *United States v. Nicholl*, 12 Id. 509; *United States v. Boyd*, 15 Pet. 187-208; *State v. Carleton*, 1 Gill, 249.

It is said that a surety is a favored debtor. His rights are especially and zealously guarded, both at law and in equity, and the slightest fraud by the creditor annuls it. His contract, exactly as he makes it, is the measure of his liability, and cannot be varied without his consent. With these privileges, however, are associated certain duties. He must take care of himself, and obtain all the information essential to his interest which lies within his reach. It is no part of the duty of the creditor to furnish him such information. If he neglects his interest, and a loss occurs, he must bear it, unless he shows

that it was in consequence of the creditor's fraud: Murfree on Official Bonds, sec. 704. And it is said by the same author that "the failure of the public officers of the United States to assert the right of the government against a defaulting principal in an official bond will not operate to discharge his sureties. Their laches, it has been repeatedly said, cannot affect the government; and even if the delay be long continued, so that the sureties lose the benefit of remedies which would have been available if the government had acted promptly, it is, so far as they are concerned, *damnum absque injuria*. A lapse of five years after the cause of action accrued will not create any presumption of payment, or in any degree operate in favor of the sureties": Id., sec. 769; see *Doe v. Postmaster-General*, 1 Pet. 318, 327; 4 Myer's Federal Decisions, secs. 770, 771; *United States v. Kirkpatrick*, *United States v. Van Zandt*, *supra*.

In this case, if the auditor received money paid him by the treasurer, applied it, as directed, to the debt due the state, in accordance with well-settled principles of law, in what degree could that act create any valid defense for the defendants? If the books of the auditor always showed the true state of the treasurer's account, and the sureties, confiding in the integrity or the responsibility of their principal, agreed to be bound for him without an inspection of his accounts, and without inquiry or examination, when by a simple act of precaution they might have learned the whole truth, and been saved from loss, if the loss occurs, who should bear it? Upon no just principle can it be placed otherwise than upon those who agreed to bear it. We think, therefore, that the evidence offered in this case constituted no valid defense to the action, and that the circuit court of Richmond City did not err in rejecting it; and the judgment appealed from here must be affirmed.

LIABILITY OF SURETIES ON SUCCESSIVE BONDS. — When successive bonds with different sureties have been given for the faithful performance of the duties of the same officer, and a breach has taken place in the conditions of the bonds in not accounting for and paying over moneys by him received, considerable difficulty may be experienced in determining upon which bond and its sureties the liabilities shall fall. With respect to the general principles applicable to such cases, there is no great contrariety of opinion; but in the application of those principles to existing cases considerable judicial dissension has been manifested.

There is no doubt that an official bond may be so drawn as to render the sureties answerable for the past as well as for the future derelictions of their principal. Thus if the condition of a bond is that the officer shall pay all

sums of money which he has received, and all which he shall thereafter receive, this language will impose on the sureties the liability for past as well as for future defaults: *Saunders v. Taylor*, 9 Barn. & C. 35. But the construction of all official bonds, in the absence of express provisions to the contrary, is prospective rather than retrospective. If the principal in the bond has received moneys prior to its execution, whether before or after his appointment to the office, the bond will not be construed as having regard to such moneys; and his default in not properly accounting for them will not be regarded as a breach of such bond: *Governor v. Gibson*, 14 Ala. 326; *United States v. Giles*, 9 Cranch, 212; *Sebastian v. Bryan*, 21 Ark. 447; *Stern v. People*, 96 Ill. 475; *Jeffers v. Johnson*, 18 N. J. L. 382; *Myers v. United States*, 1 McLean, 493; *McIntyre v. School Trustees*, 3 Ill. App. 77; *United States v. Boyd*, 15 Pet. 187. In other words, the sureties of an officer are answerable only for those acts and defaults of their principal which occur subsequently to the execution of his official bond. So if after an official bond has been given, a further bond is executed for any reason from the same officer, the sureties on this last bond are answerable only for such moneys as may be received by their principal after its execution: *Bessinger v. Dickerson*, 20 Iowa, 260; *Thompson v. Dickerson*, 22 Id. 360. If the same person is required to give annual bonds, or if having been re-elected to the same office, he gives a bond for the performance of its duties during the second term, the general rule is, that the sureties on each bond are liable only for the defaults which have occurred during the particular term or period for which it was given.

The defaults of a prior term are not chargeable against the sureties on an official bond for a subsequent term: *Bissell v. Saxton*, 77 N. Y. 191; *Patterson v. Inhabitants etc. of Freehold*, 38 N. J. L. 255; *Paw Paw v. Eggleston*, 25 Mich. 36; *Rochester v. Randall*, 105 Mass. 295; 8 Am. Rep. 519; *Street v. Laurens*, 5 Rich. Eq. 227; *Heuitt v. State*, 6 Har. & J. 95; 14 Am. Dec. 259. So far as practicable, the sureties upon the last bond should be treated precisely as if their principal had not been the incumbent of the office during the preceding term: *City of Detroit v. Weber*, 29 Mich. 24; *Vivian v. Otis*, 24 Wis. 518; 1 Am. Rep. 199; *Paducah v. Cully*, 9 Bush, 323; and those upon the first bond as if he had not been the incumbent during any future term. The sureties of an officer are not liable for moneys which, either in fact or in contemplation of law, came into his possession during the term subsequent to that for which they became his sureties: *Tyler v. Nelson*, 14 Gratt. 214; *Bryan v. United States*, 1 Black, 140; *Heuitt v. State*, 6 Har. & J. 95; 14 Am. Dec. 259.

If, however, the moneys which have been collected during the first term of office remain in the custody of the officer when he enters upon the discharge of his duties for the second term, the sureties for the latter term immediately become answerable therefor, and those of the former term are relieved from further liability: *Board of Education v. Fonda*, 77 N. Y. 350; *State v. Van Pelt*, 1 Ind. 304; *Morley v. Town of Metamora*, 78 Ill. 394; 20 Am. Rep. 266; *De Hart v. McGuire*, 10 Phila. 359; *Moore v. Madison Co.*, 38 Ala. 670. One of the most embarrassing questions which arises in connection with the subject we are now considering is, when, if at all, the sureties for a second term become chargeable with moneys which their principal ought to have had on hand, and to have paid over to himself as his own successor at the beginning of such term, when there is either no evidence to show whether or not he in fact had such moneys on hand, or the evidence adduced establishes that he in fact made payments thereof out of moneys collected during his second term of office.

It is sometimes the duty of an officer, notwithstanding the expiration of his official term, to proceed to complete some matter which has devolved upon him officially. In that event, his sureties remain liable for his acts done after the termination of his office. Thus if a sheriff has levied a writ, it will be his duty to proceed to advertise and sell the property, whether his term of office has expired or not. So if a public administrator, or one who from his official position is charged with the administration of the estate of decedents, has had committed to him the administration of a particular estate, it is his duty to proceed to the completion of such administration, though the period for which he was elected has expired. In either case, the officer may be re-elected, and enter upon the discharge of his duties for a second term; but if so, in proceeding upon the writs levied or estates committed to him for administration in a prior term, he is in the discharge of the duties of the former rather than the latter term, and the sureties for the first term are answerable for his defaults: *People v. Ten Eyck*, 13 Wend. 448; *State v. Watts*, 23 Ark. 304; *Dobney's Adm'r v. Smith*, 5 Leigh, 13; *Tyler v. Nelson's Adm'r*, 14 Gratt. 214. And in Tennessee, it is said, if the sheriff, after collecting a portion of the county taxes, is required to give a new bond, and does so, his sureties on such new bond are liable for the moneys collected before its execution: *Miller v. Moore*, 3 Humph. 189. This decision, however, may be sustained upon the theory that while such taxes were collected before the new bond was given, they remained, or were presumed to remain, in his custody until afterwards, in which event it is clear that the bond is security for their payment to the authorities legally authorized to receive them.

When the sureties of an officer for the first term remain answerable for moneys collected or converted by him during a second term, it must, as we have already indicated, be upon the ground that, as to such collection, he is simply continuing to discharge the duties of his former term. Hence, the proper test, it seems to us, in such cases, is to inquire whether the officer had so far entered upon the execution of a writ before his first term expired that it would have been his duty to continue in the execution of such writ, even if he had not been re-elected. Where this is the case, the sureties for the first term should be held liable, because they would have been answerable for his defaults if he had not been an incumbent for the second term; and the sureties for the second term should be exonerated, because the official default was not of a duty which their principal could have been called to discharge had he been in office only for that term for which they became his sureties.

Perhaps a majority of the cases upon the subject have accepted and applied this test. Others, however, have manifestly ignored it. In some of the states the liability of the sureties attaches upon the receipt of the writ, whether anything is done under it during that term or not: *Robey v. Turner*, 8 Gill & J. 125. This is also the law in Illinois; but the decision in that state was very properly founded upon provisions of its statutes, which imposed upon the officer who had received the writ the duty of executing it after the expiration of his official term, although he had not previously made any levy, or taken any other proceedings thereunder: *McCormick v. Moss*, 41 Ill. 352. In a number of the other states, the test we have mentioned seems to be accepted; and if the officer has made a levy, or entered upon the execution of the writ during his first term, the sureties for that term remain liable: *Tyree v. Wilson*, 9 Gratt. 59; *Hill v. Fitzpatrick*, 6 Ala. 314; *Low v. Cobb*, 2 Sneed, 18; *Fitts v. Hawkins*, 2 Hawks, 394; *Larned v. Allen*, 13 Mass. 395; *Sidner v. Alexander*, 31 Ohio St. 378; while if a writ received during

the first term remains in his hands wholly unexecuted until he enters upon the duties of the office for the second term, the sureties for the last term are liable for his neglect to execute it, or for his failure to pay over moneys which may be received under it: *State v. Roberts*, 12 N. J. L. 114. In Missouri and Alabama, the test applied is, to inquire what was the actual date of the conversion, and to hold liable those who were the officer's sureties at that time, though his action may have commenced under a writ received by him during his prior term of office: *Ingram v. McComb*, 17 Mo. 558; *Warren v. State*, 11 Id. 583; *State v. McCormack*, 50 Id. 568; overruling *Marney v. State*, 13 Id. 7; *Governor v. Robbins*, 7 Ala. 79; *Dumas v. Patterson*, 9 Id. 484. In Tennessee, if the action is for a failure to return the writ, it may be brought against those who were sureties at the time when it was the duty of the officer to make such return, though the writ was received by him during a preceding term.

It seems to us that there is a difference in principle between those officers whose duty it is to retain, during their second term, moneys which have been paid over to them during a first term, and those officers whose duty it is not to retain such moneys, but to pay them to some private individual. For instance, it is clearly the duty of the county treasurer to retain in his possession, on entering upon his duties for a second term, the same moneys which he had at the end of the preceding term, and to keep those moneys in his possession until they are drawn from the treasury pursuant to law. Hence, if he does in fact retain such moneys, it is very clear that the sureties for the second term become answerable therefor. But if a justice of the peace has collected money during a particular term of office which belongs to a private individual, it is his duty to pay such money over to the person entitled thereto, rather than to retain it upon his re-election; and if a default occurs during his second term, it may properly be regarded as a default in the duties which were imposed upon him for the first term. In other words, his sureties for the second term cannot be regarded as stipulating that he will receive from himself and properly pay over moneys received during his former term: *Warren v. Jeffrey*, 18 Ill. 329. If, on the other hand, he has, during the former term, received bills for collection which he has not collected, and he retains those bills, and collects them during his second term, his sureties may be held answerable therefor, because by retaining them in his hands when he entered upon the second term he may be regarded as again undertaking to collect such bills, and to properly account for their proceeds: *Governor v. Lee*, 4 Dev. & B. 457.

When, at the end of a second term of office, it is discovered that the officer has converted moneys received by him during a former term, and there is no evidence to establish the actual date of the conversion, it will be impossible to recover in an action against either set of sureties, unless some presumption can be indulged that the default occurred either in the one term or the other. According to a preponderance of the authorities, when an officer receives money, and especially if he makes a proper entry thereof upon his books or reports the receipt to the proper authorities, the presumption will be indulged that such moneys continued to be in his official custody until the contrary is shown, and as there is no showing upon the subject until the default is discovered, either in or after his last term of office, the sureties for that term are *prima facie* answerable, and, to escape liability, must show that the default actually occurred before they became such sureties: *Heppe v. Johnson*, 73 Cal. 265; *Bruce v. United States*, 17 How. 437; *United States v. Earhart*, 4 Saw. 245; *Kelly v. State*, 25 Ohio St. 567. The

minority of the authorities proceeds upon the principles exactly the reverse to those assumed by the majority, and declares that when moneys are received by a public officer, his liability and that of his sureties becomes fixed at once, and that it continues until removed by the proof that he has disposed of the money as required by law; and that his sureties upon his bond for the term at which he received the money remain liable, unless they can show that such moneys continued in his hands at the time when he entered upon the discharge of his duties for the succeeding term: *Freeholders v. Wilson*, 16 N. J. L. 110; *Trustees of Schools v. Smith*, 88 Ill. 181; *Overacre v. Garrett*, 5 Lans. 156; *Coons v. People*, 76 Ill. 383.

Receipts given and reports made by a public official constitute important, and sometimes controlling, evidence for the purpose of determining his liability and that of his sureties. There is no doubt that entries made by a public officer in his books, receipts given by him to persons authorized to demand them, and reports made by him in his official capacity, are each and all parts of the *res gestæ*, and are competent evidence against his sureties, as well as against himself: *Coleman v. Pike County*, 83 Ala. 326; 3 Am. St. Rep. 746, and note; *Boone Co. v. Jones*, 54 Iowa, 699; 37 Am. Rep. 229, and note; *Board of Supervisors v. Bristol*, 99 N. Y. 316; *Placer County v. Dickerson*, 45 Cal. 12; *Dumas v. Patterson*, 9 Ala. 484; *Frazier v. Laughlin*, 6 Ill. 347; *Grayham v. County Court*, 9 Dana, 182. As against the officer himself, his reports are conclusive. He is estopped from controverting them, except as a defense to a criminal prosecution against him: *State v. Hutchinson*, 60 Iowa, 478.

When an officer who is about to enter upon the discharge of his duties for a second term makes a report to or a settlement with the proper authorities from which it appears that he has on hand at the close of his first term a certain sum of money, such settlement is, in the opinion of many of the courts, conclusive upon his sureties for the second term, as well as upon himself, if the officers, with whom the settlement is made, act in good faith, and have no knowledge that the sum of money which he reports is not actually in his hands: *State v. Grammier*, 29 Ind. 551; *Baker v. Preston*, 1 Gilmer, 235; *Boone County v. Jones*, 54 Iowa, 699; 37 Am. Rep. 229; *Morley v. Town of Metamora*, 78 Ill. 394; 20 Am. Rep. 266; *Roper v. Sangamon Lodge*, 91 Ill. 518; 33 Am. Rep. 60; *Cawley v. People*, 95 Ill. 249; *Chicago v. Gage*, 95 Id. 593; 35 Am. Rep. 182. The reasoning upon this subject has been more forcibly stated by the supreme court of Iowa than elsewhere, in deciding the case of *Boone County v. Jones*, *supra*, in which that court said: "The defendants offered to prove from the books that Jones could not have been a defaulter in any sum at the time his bond was given, by showing that after that time he paid out more money than he received, and offered to prove that on the eighteenth day of November, 1876, when the bond was given, and before that, there were deficits in the treasurer's accounts. They also offered to prove how much money there was in the treasurer's office on that day. All this evidence was excluded on the objection of the plaintiff, upon the ground that the treasurer and his sureties were bound by the settlement made in 1877, and the settlements after that, as shown from his books, and that they were thereby estopped from showing that the defalcation existed before the bond was given. The defendants also asked that several instructions be given to the jury to the effect that the defendants were only liable upon the bond for such defalcations as occurred after the bond was given, which instructions were refused.

"These rulings of the court are claimed to be erroneous, and the question as to their correctness is the main point in the controversy in the case. Coun-

sel for the appellant cite a large number of authorities to the effect that where an official bond is not retrospective, the sureties thereto are only bound for the public money in the hands of the officer when the bond was executed, and for that which subsequently came into his possession, and cannot be held for past derelictions of duty by their principal. That the proposition is correct, can admit of no question. It has been repeatedly so held by this court: *Mahaska County v. Ingalls*, 16 Iowa, 81; *Bessinger v. Dickerson*, 20 Id. 261; *Warren County v. Ward*, 21 Id. 84; *School District v. McDonald*, 39 Id. 464.

"But the question we are called upon to determine in this case is, the admissibility of the offered evidence to show the fact as to when the defalcation or embezzlement occurred. In *State v. Grammier*, 29 Ind. 531, it is said: 'It is true that the sureties of a public officer, in the absence of special agreement, are only liable for a defalcation of their principal during the term of office covered by the bond, but what shall be received as a proof of such defalcation is quite another question.' In determining the question as to whether the officer and his sureties should be estopped from contradicting the reports of the treasurer and the settlements made by him with the board of supervisors, we are controlled largely by the statute in force in this state requiring such settlements to be made. Before citing the statute, however, it may be proper to say that upon a careful examination of the authorities cited by counsel for appellants we have found no case exactly in point. They are for the most part cases which determine the general proposition that a surety is not liable for derelictions of his principal before the date of the bond, and the question of estoppel based upon settlements with the officer does not appear to have been under consideration. We have seen that the law requires the settlements to be made with the treasurer in January and June of each year. Suppose that he should refuse to make such settlement, or it should appear by an examination of his books and the counting of his cash that he was a defaulter, he would be liable to be removed from office: Code, 746. He would also be liable to prosecution for the crime of embezzlement. Now, suppose at the time of settlement he should show by his books and by the money in the vaults of the treasury that he was not a defaulter, has the county the right to rely upon such showing? Or can he by false statements of account, or by borrowing money temporarily to be counted in settlement, mislead the board of supervisors, and avoid proceedings against him, or possibly the demand of an additional bond, and then when sued upon his bond show that his settlement was a fraud upon the county, and that the defalcation actually occurred during a former term? We are clearly of the opinion that he cannot. By showing such contradictions of these settlements, courts would open the doors to escape from liability upon almost every official bond. By shifting the defalcation back to a former term, the statute of limitations would in most cases preclude all hope of recovery, unless when a defaulting treasurer who has held successive terms should be sued upon all his bonds, and then the shifting process could well be applied to each case. We think the question has every element of estoppel, and that to hold such evidence competent would not only be to allow the treasurer to take advantage of a wrong by which he deceived the county to its injury, but would be contrary to public policy.

"In *McCabe v. Rainey*, 32 Ind. 309, it is well said that 'a party will be concluded from denying the truth of his own admissions which were intended to influence the conduct of another, and did influence it, when such denial will operate to the injury of the latter.'

"In *Baker v. Preston*, 1 Gilmer, 235, a proceeding against a defaulting treasurer and his sureties, it was held that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year. See also *State v. Grammier*, 29 Ind. 531, where the last above case is cited with approval: *Morley v. Town of Metamora*, 78 Ill. 394; and *Gage v. City of Chicago*, 2 Brad. App. 332. It is true that in the last above-cited cases the settlement or statement made by the officer was made at or before the dates of the bonds, but we think they are in principle the same as the case at bar, because the statute requires these settlements to be made at stated periods. They are conclusive that up to the time they were made no defalcation existed. It will of course be understood that the rule we here announce would not preclude the officer and his sureties from showing, in a proper case, that there were mistakes in his books and settlements; but no such case is presented in this record."

In a later case in the same state, where it appeared that at the time of a settlement by a county treasurer the board of supervisors did not in fact insist on the production of the moneys which his account showed to be on hand, but permitted him to make an apparent showing with checks and certificates of deposit which they knew to be either spurious or worthless, it was decided that the sureties on his bond for the second term were not estopped by such settlement, and could be relieved from liability by showing the real amount which their principal had on hand at the end of his former term of office: *Webster County v. Hutchinson*, 60 Iowa, 721.

If a public officer, such, for instance, as a receiver of public moneys, gives receipts for moneys which he has not in fact received, whereby a fraud is perpetrated upon the United States, his sureties at the time are doubtless estopped from denying that he had received such moneys, because they have, among other things, stipulated that he shall faithfully discharge the duties of the office, and the giving of the receipts when the money was not in fact paid to him is a breach of this condition of his bond: *United States v. Girault*, 11 How. 22. But where the sureties for a subsequent term are pursued, an entirely different question arises. As the giving of the receipt was not an official act done during the term for which they had become sureties, it is not a breach of the condition of the bond signed by them. At the present time, we think the weight of authority favors the rule that the sureties for a public officer are not estopped by reports made by their principal during or at the close of the preceding term. Such reports are *prima facie* evidence against them, but are not conclusive, and the sureties may, if they can, show that the amount which their principal received from himself upon entering upon the duties of his second term of office was less than that shown by his report: *Vivian v. Otis*, 22 Wis. 518; 1 Am. Rep. 199; *Bissell v. Saxton*, 66 N. Y. 55; *Broul v. City of Paris*, 66 Tex. 119; *State v. Rhoades*, 6 Nev. 352; *State v. Newton*, 33 Ark. 276; *Mann v. Yazoo City*, 31 Miss. 574. The leading case upon this subject is that of *United States v. Boyd*, 5 How. 29, in which the court said: "It has been contended that the returns of the receiver to the treasury department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence in the first instance of the indebtedness of the officer against the sureties, but subject to explanation and contradiction. They are responsible for all the public

moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for, but not for moneys which the officer may choose falsely to admit in his hands in his accounts with the government. The sureties cannot be concluded by fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases."

The cases in Indiana maintaining a different rule, one of which was very much relied upon by the supreme court of Iowa in *Boone County v. Jones*, *supra*, have been directly overruled, and it is said that the courts of Virginia have manifested a desire to depart from the doctrines of *Baker v. Preston*, *supra*, on the same subject: *Lowry v. State*, 64 Ind. 421; *Ohniny v. Evansville*, 66 Id. 59; *State v. Manchester*, 79 Id. 294.

Through the application of payments made either by operation of law or by the act of their principal, the sureties for a second term of office may become answerable on their bond, although the sum paid out by their principal exceeds that received by him during the same period. It is well known that where an ordinary debtor makes a payment of money, it must be applied in such manner as he may direct, and in the absence of such direction, to the claims which have been longest standing, and against which the statute of limitation would be first to operate. There is, however, a very grave question whether the moneys paid over by a public officer may be regarded as his moneys for the purpose of permitting him to direct their payment, or of giving operation to the ordinary principles of the application of payments when no direction whatever is made by him. The cases in the supreme court of the United States tend very strongly, to say the least, to support the proposition that the ordinary rules governing the application of payments are inapplicable to such a case. In *United States v. January*, 7 Cranch, 572, the defendants were sued as the sureties of John Arthur, a collector of the revenues. Arthur's first bond was executed on the 25th of August, 1797. The supervisor of revenue for the district, for the greater security to the government, obtained a further bond from Arthur on the 25th of March, 1799. On the settlement of Arthur's accounts in the year 1803, he was in arrears in a large sum of money, for which suits were instituted on each of his bonds. The sureties on the first bond sought to relieve themselves from liability by showing that the supervisor of revenue had stated that a sufficient sum had been paid to discharge the bond first given, and that what had been paid should be so applied. Evidence to this effect having been offered, the supervisor admitted that the payments made by Arthur, if applied to the first bond, would discharge it, and that he, the supervisor, might have told Arthur's sureties, and others, that the whole of the bond would be paid off, if the payments made by Arthur were appropriated exclusively to its discharge, and that he, the supervisor, entertained the opinion that they ought to be so applied. Further testimony was offered and received to the effect that the defendant, January, several times called at the office of the supervisor, and was assured by him that Arthur had paid enough to discharge the bond, and that he refused to give up the bond only because he thought that it ought to remain as a voucher in his office.

The plaintiffs thereupon asked the court to instruct the jury that the promise of the supervisor as to the application of the payment in discharge of the bond was not of itself an appropriation of the payments, unless followed by some act of appropriation. The court denied this instruction, and, at the instance of the defendants, instructed the jury that if the supervisor had made

the promise as proven, it was the declaration of his election how the payments should be applied, and that a formal entry in the books corresponding with that election was not necessary to give it effect. It will be seen from the above statements that there was no evidence offered for the purpose of showing that the collector, at the time of making his payments, or afterwards, sought to have them applied to one debt rather than another, nor was there anything in the instructions given or refused by the court upon the point whether, in the absence of any instructions from the collector, his payments ought or ought not to be applied to the debts against him which had been the longest outstanding. The supreme court, however, going somewhat beyond the exigencies of the case, made use of the following language: "The law with respect to the application of particular payments when the debtor owes distinct debts has long since been settled. The debtor has the option, if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application. In this case, a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is: where the receiver is a public officer, not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising, due, and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond without manifest injury to the surety in the second bond, and *vice versa*. Justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any, in the possession of the parties interested. The court is of the opinion that the circuit court erred in the opinion given, and that it be reversed."

The next case in the same court is that of *United States v. Eckford's Ex'rs*, 1 How. 250. The defendants had been the sureties of Swartwout, the former collector of customs in the city of New York. He had filled the office during three successive terms, for each of which a separate bond had been given. The course of business seemed to be to charge him with all sums for which he was liable, and to credit him for all sums paid, without making any especial application of the payments to one item or term rather than to another. The judges of the trial court were unable to agree, and certified two questions for the opinion of the appellate court, the second of which was: "Whether the payment made by said Swartwout subsequently to the said twenty-eighth day of March, 1834, should be applied to the discharge of his indebtedment existing on the said twenty-eighth day of March, 1834, or accruing during his said second term of office, or whether such payment should be applied to the discharge of the indebtedment accruing after that time." It does not appear in the statement that Swartwout ever undertook to direct the application of payments, nor whether there was any report accompanying his payment for the second term, showing whether the amounts then paid were made up of collections chargeable against the second term rather than the first. The court reaffirmed the principles stated in the case of *United States v. January*, *supra*, and added:—

"The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict

the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of the trust, the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But this is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and, by such appropriation, hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration. If the collector be in default for a preceding term, it is the duty of the treasury department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties of such term. The money in the hands of the collector is not his money. Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty, — the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? It is contended that their responsibility arises, not from the default of the collector, but from the appropriation of his payments by the treasury. This, at least, is the fair result of the doctrine advanced; for if such appropriation is properly made by the treasury in payment of a defalcation of the collector before the commencement of the current term, it must follow that the sureties for such term are responsible for the amount thus paid. The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them; and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. This restatement does not falsify the general account, but arranges the items of debits and credits so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions or in the form of a transcript, may not be material. We think that the transcript or restatement of the account, as explained by the depositions, was competent evidence to the jury. This statement, as appears from the deposition of Tarbutt, is defective in not giving all the credits to which the collector was entitled; but as it relates to the matter in controversy, it is evidence. The jury will determine what effect it shall have.

“The amount charged to the collector at the commencement of the term is only *prima facie* evidence against the sureties. If they can show by circumstances or otherwise that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied. If the sum charged consists of duty bonds, the defendants may show that the bonds were never paid. These remarks apply to the sureties under every new appointment of the collector, and to

the balance charged against him. On the 29th of March, 1834, a new official term of Swartwout commenced, and new securities were given. On that day a large apparent balance was due to the government by him. Now, the inquiry should be, Of what did that balance consist? Did it arise from a misapplication of the public moneys during the preceding term? If so, the sureties of the preceding term are liable for the amount thus misapplied. But if there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the treasury, the sureties are discharged. In answer to the question, 'whether the payments made by the collector subsequently to the 28th of March, 1834, should be appropriated in discharge of his indebtedment on that day,' we say that so far as such payments were made of moneys accruing and received in the subsequent term they should not be so applied. But so far as payments were made in the subsequent term of moneys received on duty bonds or otherwise, which remained charged to the collector as of the preceding official term, such payments should be appropriated in discharge of the indebtedment of the collector for that term. The sureties are only responsible for a misapplication of the public money during the four years preceding the 29th of March, 1834. And of course the extent of this responsibility must be shown by the government. As before remarked, the court consider the official terms as distinct and separate in regard to the sureties as if different persons had served in the three terms specified; that the legal responsibilities of the sureties are not and cannot be affected by any action of the treasury department. If liable, the sureties are made so by their contract; and the government, being a party to that contract, cannot, without the consent of the defendants, change its legal or equitable effect."

In some of the state courts, the principles stated in the foregoing decisions have been adopted, and the general statement made that the sums received by an officer during each term must be paid to the credit of that term, and an attempt has been made to keep the two terms as nearly separate as possible: *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291; *State v. Smith*, 26 Mo. 226; 72 Am. Dec. 204. If the officer has not directed the application of his payment to any particular liability, and the officers with whom he settled know the source from which the moneys have been received, it is probably their duty to apply the payment accordingly, and not to the satisfaction of a pre-existing deficiency: *Porter v. Stanley*, 47 Me. 515; *Boring v. Williams*, 17 Ala. 510. The latest and best considered decisions, however, tend to reinstate the common-law rules with respect to the application of payments, and to apply them to the accounts of public officers, as well as to those of private individuals. If a general account is kept, and the payments are made without any direction as to how they shall be applied, the moneys paid are treated as though they were the property of the payor, and applied to the satisfaction of the oldest debts or accounts existing against him: *Chapman v. Commonwealth*, 25 Gratt. 721; *Readfield v. Shaver*, 50 Me. 36; 79 Am. Dec. 592; *Inhabitants of Sandwich v. Fish*, 2 Gray, 298; *Egremont v. Benjamin*, 125 Mass. 15; *Boody v. United States*, 1 Wood. & M. 150. Mr. Justice Story, in considering the cases decided in the supreme court of the United States, has insisted that they are not necessarily inconsistent with this rule: *United States v. Wardwell*, 5 Mason, 82; *Postmaster v. Furber*, 4 Id. 333.

The right of an officer to direct the application of payments made by him

seems now to be as well established as that of a private individual, though in directing such application he may, in effect, take moneys which he has collected during his second term, and with them satisfy the deficiency which existed at the close of a former term, and thus shift the responsibility for such deficiency from the sureties of his first term to those of the second: *Lyndon v. Miller*, 36 Vt. 329; *Chapman v. Commonwealth*, 35 Gratt. 721; *Attorney-General v. Manderson*, 12 Jur. 383; *Williams v. Rawlinson*, 10 Moore, 371; *Gwynne v. Burnell*, 7 Clark & F. 572; 2 Bing. N. C. 7; *Stone v. Seymour*, 15 Wend. 19; *Egremont v. Benjamin*, 125 Mass. 15; *State v. Hayes*, 7 L.L. Ann. 121; *State v. Powenn*, 40 Id. 234; 8 Am. St. Rep. 522; *Colerain v. Bell*, 9 Met. 499; *State v. Smith*, 32 Mo. 524; *State v. Smith*, 26 Id. 226; 72 Am. Dec. 204; *Cook v. State*, 13 Ind. 154. The reasoning sustaining these decisions is this: the sureties of the second term are responsible for any misappropriation of the moneys collected during that term, and the taking of such moneys, and with them paying a deficiency existing during a preceding term, is as much a misappropriation as though they were taken and used in payment of a private debt of the principal, or for any other purpose to which he had no right to apply them. Some weight has also been conceded to the suggestion that any other rule may enable a public officer to pay past defalcations out of moneys in his hands, and thus to conceal their existence until the statute of limitations interposes its protection to those who were his sureties when such defalcations occurred, and leaves the government without any remedy whatsoever. Furthermore, as the accounts of a defaulting official are rarely so kept as to preserve evidence to establish the time when he first became remiss, it is practically impossible to show whether the appropriation of payments made by him is inequitable or not, or if shown to be inequitable, then to point out the items to the discharge of which the payment ought to have been applied.

There is probably one respect in which the law on the application of payments made by a public officer differs from that of payments made by a private individual. It is this: if a private individual makes no application of a payment, the creditor or his agent may make such application at his pleasure; but where a public official pays any money without any direction respecting its application, and the officers to whom the payment was made know the source from which the moneys were obtained, and the application of them which ought in justice and equity to be made, they are not at liberty to make an application which will divert the moneys from the discharge of the obligation to which they ought to be applied. Hence if such officers know that moneys have been collected by an official during his present term of office, and he does not direct their application, they are not at liberty to apply them to the satisfaction of a balance due from him for some preceding term: *Porter v. Stanley*, 47 Me. 515; *Boring v. Williams*, 17 Ala. 510. Possibly this is also true, if when an officer directs the application of his payment to a particular account, the officials to whom the payment is made know whence the moneys came, and that the application directed is a fraud on those who are the sureties of the officer at that time. Some of the cases sustaining improper applications of payments made by officers dwell upon the fact that such payments were received in good faith and in ignorance of any misappropriation, and seem to regard that fact as material. Its materiality is, however, upon principle, subject to serious doubts, because the receiving officials have not such control over the paying official that they can require the latter to pay one demand existing against him in preference to another.

When one person at the same time occupies two or more offices, they should be treated, as far as possible, as though they were occupied by different persons. The result of this is, that a default in one office must not be charged against the sureties on the official bond of the officer as the incumbent of the other office: *People v. Edwards*, 9 Cal. 286. If it should be the duty of the same person, while acting in one official capacity, to receive moneys from himself in another official capacity, and it should afterwards be discovered that he has converted such moneys to his own use, there will naturally be great difficulty in ascertaining whether the default shall be charged against his sureties for one office rather than the other. In the case of *Butte County v. Morgan*, 76 Cal. 1, it appeared that the defendant, Morgan, at the same time held the offices of tax collector and treasurer of the same county, and that in his capacity of tax collector he made a settlement with the county auditor, in which they agreed upon the amounts then due to the county, and the auditor thereupon gave a certificate which stated that "William J. Morgan, tax collector, has this day the amount as given below, to be paid into the county treasury." The auditor then handed this certificate to Morgan, who took it away with him, and the auditor thereupon credited the tax collector with the amount as paid, and charged the treasurer with it. A suit having been brought against the sureties of Morgan as treasurer, and judgment entered in favor of the plaintiff, the defendants contended that there was no evidence to sustain the finding that Morgan had become answerable as treasurer by ceasing to be liable as tax collector. The appellate court, however, regarded the circumstances which we have stated as at least equivalent to an admission upon the part of the defendant, Morgan, in his capacity as treasurer, that he had received from himself the moneys which he had collected as tax collector, and that this admission was at least *prima facie* evidence against his sureties as treasurer, and sustained the judgment entered against them.

Frequently public officials are charged with the performance of duties which do not properly fall within the functions of their office, and for the faithful performance of which they are required to give a special bond. Where this is the case, sureties on the general bond which the officer has given are not liable for any defalcations which he may commit, and against which the public is secured from loss by the special bond: *Milwaukee v. Ehlers*, 45 Wis. 281; *State of Ohio v. Corey*, 16 Ohio St. 18; *State v. Johnson*, 55 Mo. 80; *Commonwealth v. Tom*, 45 Pa. St. 408; *Williams v. Morton*, 38 Me. 52; *State v. Young*, 23 Minn. 551. In a very recent case in North Carolina the supreme court has decided that if additional duties are imposed upon an officer without requiring of him any special bond, that the performance of such duties is secured by any general bond which he may have previously given; and that, "on the other hand, where a law charging an officer with a new duty requiring in express terms an additional bond for its faithful performance, or one embodying conditions different from those necessary in that already required, an official default in misapplying funds received by virtue of said office is not held to be a breach of the bond conditioned for the faithful discharge of the duties of the office, even when it embraces the new duties only in general, and not in specific terms": *County Board v. Bateman*, 102 N. C. 52; 11 Am. St. Rep. 708.

Certainly the sureties of an official are not liable for moneys, received by him after he is out of office, or after the expiration of what may ordinarily be regarded as his official term. After he ceases to be an officer, he has no further power to charge them with liability for his misdoings than if he had never been an incumbent of the office: *United States v. Nicholl*, 12 Wheat.

505; *Streshley v. United States*, 4 Cranch, 169; *South Carolina Soc. v. Johnson*, 1 McCord, 41; *Bigelow v. Bridge*, 8 Mass. 275; *Commissioners v. Greenwood*, 1 Desau. 450; *South Carolina Ins. Co. v. Smith*, 2 Hill (S. C.), 589; *Mayor v. Horn*, 2 Harr. (Del.) 190. It is notorious that public officials frequently do not cease to perform the duties of the office at the precise moment designated by law as the end of their official term. If their successor has not qualified, it is generally their duty to continue in the discharge of the functions of the office until either he or some one elected or appointed in his stead qualifies and becomes entitled to the office. Furthermore, there may be doubts respecting the validity or result of an election, and the incumbent of the office may continue to discharge its duties under the claim that he has been re-elected, or for some other cause is better entitled than any other person to the possession of the office. In none of these cases is there any provision of law requiring the giving of a new bond, and the public is manifestly without any remedy whatever, unless the bond given can properly be construed as indemnifying the public from loss for any defalcation which occurs while the incumbent continues at least an officer *de facto*, in possession of the office. In some of the states the broad rule is maintained that when an officer holds over after the expiration of his term because his successor has not qualified, that the sureties on his bond remain answerable for his conduct: *Thompson v. State*, 37 Miss. 518; *Butler v. State*, 20 Ind. 169. There are other states in which the same rule has been asserted, but the circumstances in which it was thus asserted were such that the decisions reached are not necessarily inconsistent with those which we shall hereafter mention as being sustained by a preponderance of the authorities: *Mayor etc. of Outhbert v. Brooks*, 49 Ga. 179. In a case which arose in California the county treasurer refused to deliver his office to his successor at the expiration of the term, and remained in possession thereof for one day, during which he received a large sum of money, for which he failed to account. In an action against his sureties, they sought to escape liability on the ground that his term of office had expired. Their contention, however, was not sustained. The reasoning of the appellate court upon this subject was as follows: "Dickerson was at that time still acting in his official capacity, and was, *de facto* at least, the county treasurer of Placer County. Whether he was rightfully so or not, is not material. The defendants were still held for the breaches of official duty, and could not be permitted to claim in their defense that *de jure* the office belonged to Hollenbeck, who had not then entered upon the discharge of his duties. The responsibility of the defendants for the official acts of Dickerson, under the circumstances, was the same as though the latter had, after the expiration of his term, continued in office pending proceedings by *quo warranto* to oust him from it, and in that case their liability would be unquestionable. In this view the liability of the defendants extended to the whole account of Dickerson, and it was of no consequence to them to what part of the account the moneys received on March 3d should be applied, and his receipts on that day, given in his official capacity, for public moneys, were *prima facie* evidence to charge them": *Placer County v. Dickerson*, 45 Cal. 12.

A very decided preponderance of the authorities maintains that the liability of sureties on an official bond, where they have become sureties for a particular term of office, or for a stated period of time, cannot be continued indefinitely by the failure of the successor of their principal to qualify. Whether their principal is re-elected, or some other person is chosen in his stead, it is equally necessary that bonds for the faithful discharge of the duties

of the office be again given. If this duty is neglected, then the proper authorities must declare the office vacant, and proceed to the appointment or election of some incumbent thereto who shall be willing to comply with the law by qualifying for the office in the mode provided by the statute. The liability of the sureties will not terminate immediately upon the expiration of the official term, but if no officer qualifies within a reasonable time, they will be exonerated from all further responsibility, although their principal may in fact continue in the discharge of the duties of the office: *Mayor v. Crowell*, 40 N. J. L. 207; 29 Am. Rep. 224; *Mutual L. & B. Ass'n v. Price*, 16 Fla. 204; 26 Am. Rep. 703; *Rathway v. Crowell*, 40 N. J. L. 207; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387; *County of Wapello v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370; *Moss v. State*, 10 Mo. 338; 47 Am. Dec. 116; *Commonwealth v. Fairfax*, 4 Hen. & M. 208; *Bigelow v. Bridge*, 8 Mass. 275; *State v. Crooks*, 7 Ohio, part 2, 221; *Kingston etc. Ins. Co. v. Clark*, 33 Barb. 196; *Rang v. Governor*, 4 Blackf. 2; *Riddell v. School Dist.*, 15 Kan. 168; *United States v. Kirkpatrick*, 9 Wheat. 720. It is to be regretted that no decisions have been found discussing and determining what is such reasonable time as will discharge sureties from liability.

The leading case upon this subject is that of *Chelmsford v. Demerest*, 7 Gray, 1. This was an action brought upon a bond given to the plaintiffs, a manufacturing corporation, by their treasurer, Henry D. Phelps. The opinion of the court, as far as relates to the subject, is as follows:—

“It appears by the report of the case that Phelps was first chosen to the office in August, 1845, at a special meeting, to fill a vacancy occasioned by the resignation of the treasurer chosen at the previous annual meeting in May. On the occasion of this election, the bond now in suit was given, and no bond was given afterwards. In 1847, no one appears by the record to have been elected. In 1848, 1849, 1850, 1851, and 1852, Phelps was elected, but gave no new bond, and none was required by the directors, and no reason appears why it was not done. Phelps continued to act as treasurer until 1852. It further appears, though the fact does not seem to be material, that Phelps was clerk of the corporation, duly chosen and qualified, when he was elected treasurer, and continued to be annually chosen and to act as clerk until 1852.

“The defense relied on is, that the office of treasurer is an **annual office** by law; that Phelps was chosen for one year; that the defendant became surety for him during the continuance of that official year only, and that for any default or misconduct after Phelps's re-election for another year, the defendant was not responsible.

“But the plaintiffs rely upon the terms of the Revised Statutes, chapter 38, section 4, being the act in force at the time of Phelps's election, regulating manufacturing corporations, which, after directing that the clerk and treasurer shall, like other officers, be chosen annually, adds, ‘And shall hold their office until others are chosen and qualified in their stead.’

“The court are of opinion that, under the direction of this law, Phelps was elected as treasurer to an annual office; that the bond was a collateral security for the faithful performance of the duties of that office; and that such office being annual, such duties are limited to the term of a year. But in fixing it to one year, we do not understand the statute to mean an exact calendar year, or the number of days constituting an astronomical year. It is to be expounded according to the subject-matter, and therefore it must be construed to be for the official year of such corporation or body politic as holds annual meetings, the official year being the term ordinarily from one

annual meeting to another. Where the annual meeting is held on a given day of a week and month, as on the fourth Monday of March, the intervals will not be precisely equal; or whenever the time for the annual meeting is legally changed, as it was done in regard to the plaintiff corporation, an official year may be lengthened or shortened.

"Nor do we think that the further provision above cited — 'shall hold their offices until others are chosen and qualify' — substantially changes the character of the office from an annual one to one for an indefinite time.

"Perhaps a bond might be framed reciting that whereas the principal has been elected to the annual office of treasurer, and conditioned for his faithful performance of his duties for that term, and for such further time as he might continue to hold the same by annual election, — such contract being clear and explicit as to the intent, and made by parties competent to bind themselves, — and they remain bound, not because the office was not annual, but because they had anticipated future elections, and provisionally bound themselves accordingly. But the authorities are uniform that when the office is annual, the parties to the bond are presumed by law to bind themselves accordingly, if there are no words inserted in the bond clearly extending it to a future election: *Hassell v. Long*, 2 Moore & S. 363.

"What, then, is the legal effect of the added clause 'until others are chosen and qualified'? To give it the construction contended for by the plaintiffs would annul the previous clause making it annual. But both are embraced in the same sentence; they are equally imperative and obligatory, and if possible, both must have their natural effect. Looking again at the subject-matter, and supposing the legislature to have had in view the actual condition of manufacturing corporations, and their practical workings as bodies politic organized by law, it seems to us that the law regarded these as annual offices; but regarding the inconvenience which would arise if one were to terminate before the other commenced, one was made to continue and terminate at the same precise point of time at which the other commenced, and thus avoid any interval. But some time must elapse after the re-election to enable the officer elect to express his acceptance, and some further time, if giving bond is a necessary qualification, to enable him to procure the execution of the bond. The law having directed that such officer shall be chosen annually or at the annual meeting, it assumes and presupposes that such direction will be complied with, and then the words in question must be construed to mean till the next annual meeting, or meeting at which such annual election is to be made, and such reasonable time afterwards as shall be sufficient to enable the officer elect to procure and deliver his bond, and do whatever else is required to complete his qualification; or if he fails thus to qualify, until the corporation can elect another, and cause him to be qualified. In this way, both parts of the provision of the statute will have their legal and proper effect. But if the corporation fail to comply with their legal duty of electing a treasurer annually, or if they fail to comply with a provision of law made for their benefit, and do not require him to give bond within a reasonable time after he has signified his acceptance of the election, and especially if they permit him to go on and act in the office during the whole year, and for succeeding years, without giving bond, whatever other effect such a course may have on the rights and liabilities of the corporation, it cannot enlarge or vary the obligation of those who have become responsible for the conduct of such officer in performing the duties of an annual office.

"To avoid misconception, it is proper to say that very different consid-

erations would govern if the question were whether the corporation were bound by the acts of an officer thus by their permission exercising the office *de facto*. It is their duty and privilege to see that he is duly elected and qualified; if he is not so, the fact cannot ordinarily be known to the public dealing with him as such. They hold him out as their officer, and it would be permitting them to take advantage of their own wrong, if they could repudiate his official acts: *Hastings v. Blue Hill Turnpike*, 9 Pick. 80.

"In one of the earliest Massachusetts cases on this subject, *Bigelow v. Bridge*, 8 Mass. 275, it does not distinctly appear what the provision of law was under which the county treasurer was appointed, but upon turning to the Statutes of 1785, chapter 76, section 1, we find the provision is, that the county treasurer 'shall continue in the said office for the term of one year, and until some other person shall be chosen and qualified'; there being also a provision for an annual election. That case, therefore, is an authority to the point that, when these words are added, the office does not cease to be an annual office, and that the bond to perform its duties covers the official acts for one year only, though the action was against the principal alone.

"We refer to the usual authorities to show that when the office is in fact annual, although not so recited in the bond, still the bond only covers the official acts of the year for which it was given: *Arlington v. Merricks*, 2 Saund. 411; *Liverpool Waterworks v. Atkinson*, 6 East, 507; *Wardens of St. Saviours v. Bostock*, 2 N. R. 175; *Hassell v. Long*, 2 Moore & S. 363; *Peppin v. Cooper*, 2 Barn. & Ald. 431.

"We have referred to the cases cited and mainly relied on by the plaintiffs, but we do not think they are in conflict with the present decision. In *Dedham Bank v. Chickering*, 3 Pick. 335, there was nothing in the statute, or in any by-law or vote of the corporation, to make the office of cashier an annual office, though annual elections were usually made by the directors, but no new bond given; and, what was very material, the condition of the bonds first given, in terms bound the obligors for the good behavior of the cashier till a successor should be appointed. In *Revere v. Boston Cooper Co.*, 1 Pick. 351, it was held only that a failure to choose officers annually did not dissolve the corporation. In the case of *Boston Glass Manufactory v. Langdon*, 24 Id. 49, the same point was decided.

"The case of *Amherst Bank v. Root*, 2 Met. 522, was decided on the specific ground that, under the law as it then stood, directors had power to appoint a cashier, clerks, and other officers, who should 'retain their places until removed therefrom, or others appointed in their stead': Stats. 1828, c. 96, sec. 9. Under that statute it was held by a majority of the court that the office thus constituted was not an annual office, but indefinite as to time, although it was stated in the directors' minutes that he was chosen 'for the year ensuing.' There was no recital in the bond that the cashier was chosen for one year, or indicating it to be an annual office, and the statute did not so limit it. Mr. Justice Dewey, who dissented on one point only, was of opinion that it was competent for the directors to limit the office for one year, and that they had done so by their votes, and therefore that the office in that case was annual. But all the judges concurred in the opinion that where, by the legal constitution of the office, it is annual, whether recited or not, the bond conditioned for the faithful performance of the duties of the office, though general in terms as to time, binds the obligors only for the duties to be performed within one year.

"The court are therefore of opinion that the plaintiffs can recover in this action those damages only, if any, which the plaintiffs sustained by the mis-

conduct of the principal during the first year for which he was elected treasurer."

If there is no fixed term of office, and the officer is entitled to continue therein during the pleasure of the appointing power, his sureties will not be relieved from liability while he remains in office, though there is a requirement that the bond be renewed at stated intervals, and no such renewal has taken place: *Coplin v. McCalley*, 1 Leigh, 280.

When a bond given by an official is regarded as inadequate in amount, he is sometimes required to give, and does give, what is commonly known as an "additional bond," in such further amount as may be required by competent authority. The liability of the sureties on this "additional bond" does not extend to any defalcation committed by their principal prior to its date, nor does it release the sureties on the prior bond given by him from liability for any of his defalcations, past or future: *Sebastian v. Bryan*, 21 Ark. 547; *Postmaster-General v. Munger*, 2 Paine, 189. If moneys have been collected prior to the execution of the additional bond, and the principal converts them afterwards, the sureties upon the additional, as well as those upon the original, bond are liable for such conversion: *Governor v. Robbins*, 7 Ala. 79; *Dumas v. Patterson*, 9 Id. 484. The additional bond and that previously existing become concurrent securities for the faithful discharge of the official duties of the principal after the giving of the last bond. The term "additional bond" must not be understood as indicating that it is a bond to which resort can be had only after the remedies under previous bond have been exhausted. On the contrary, the liability of the sureties on the two bonds is, with respect to matters occurring after giving the last bond, the same as though they had become sureties for their principal at one time and by one bond: *State v. Watts*, 23 Ark. 304; *State v. Sappington*, 67 Mo. 529; 68 Id. 454; *United States v. Hoyt*, 1 Blatchf. 326; *State v. Crooks*, 7 Ohio, part 2, 221; *Jones v. Hays*, 3 Ired. Eq. 502; 44 Am. Dec. 78; *Hutchcraft v. Shrout's Heirs*, 1 T. B. Mon. 206; 15 Am. Dec. 100; *Jones v. Blanton*, 6 Ired. Eq. 120; *Allen v. State*, 61 Ind. 268; 28 Am. Rep. 673.

YATES v. TOWN OF WARRENTON.

[84 VIRGINIA, 537.]

STATUTE OF LIMITATIONS. — ENCROACHMENT ON A PUBLIC STREET IS A NUISANCE, AND HOWEVER LONG CONTINUED cannot ripen into prescriptive title of the part so encroached upon.

SUIT for an injunction to prevent the defendant from removing encroachments upon a public street. The injunction was denied, and the plaintiff thereupon appealed.

R. Taylor Scott, for the appellant.

R. R. Campbell, for the appellee.

LACY, J. This case is a contest over an alleged encroachment by the appellant, Henry C. Yates, on one of the streets in the town of Warrenton, in the county of Fauquier. On the 3d of March, 1887, the town council of Warrenton entered an

order to the effect that information being received that H. C. Yates had given notice of his intention to resist the sergeant of the town if he attempted to straighten the line of North Fourth Street in laying the walk, Mr. Yates's line being on the street, and the sergeant desiring instruction, the sergeant was ordered to straighten the said line, despite the resistance of said Yates. The sergeant, with a *posse*, entered upon the ground in dispute and commenced to tear down the fence of said Yates situated thereon, when an injunction was obtained by Yates, and the work stayed by the said circuit court. The circuit court ordered a survey of the disputed ground and the adjacent lot of Yates, and upon the coming in of the report of the surveyor, and the evidence adduced, the injunction was dissolved on the first day of July, 1887, by decree in the cause, and the lines of said North Fourth Street established in accordance with the report of the surveyor, which was in accordance with the claim of the town of Warrenton as to said street; whereupon the appellant, Henry C. Yates, appealed to this court. The evidence shows the dedication of the said street by persons appointed by act of assembly to lay off and establish the town of Warrenton, in 1811. North Third Street having been laid off, the report is as to North Fourth Street as follows: "Begins at the corner of G. B. Horner's shop, now occupied by Richard Baker, and extends twenty-three feet to Norris's store, and runs thence parallel to the former" (Third Street). The street appears to be twenty-three feet wide, except a small encroachment at the corner between what is designated Horner's shop on one side and Norris's store on the other (not involved here), and at the place in dispute on Yates's line the fence of Yates comes outward into the street and occupies twenty-three inches of the street, if the same is to be of uniform width, and to run parallel to North Third Street. A survey of Yates's lot by his deed shows that he has all the land his deed calls for without the twenty-three inches of the street in dispute. But Yates proved long user by him of this twenty-three inches, and the existence of an old fence exactly where the new fence is; but it is proved that certain large trees cut down on the inside of this fence once stood on the outside of a narrow pavement used by the town at this point. The dedication and its acceptance having been proved on the part of the town, under the decisions of this court no length of time of encroachment and user by the land-owner can affect the question.

In the case of *Taylor v. Commonwealth*, 29 Gratt. 780, this court held that a "valid dedication of a street to the public use perfected by acceptance makes it a highway, an unlawful obstruction of which is not legalized by lapse of time. *Nullum tempus occurrit regi* applies in this state to the commonwealth as it does in England to the king"; and again: "Nor can there be any doubt or difficulty in the case as to the question of law in regard to the effect of the lapse of time and adverse possession upon the public right." Mr. Dillon says (2 Dillon on Municipal Corporations, c. 18, sec. 520): "The principle that streets and public places belong to the general rather than to the local public is one of great importance, and has been sometimes overlooked by the courts, because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use. Any unauthorized obstruction of the public enjoyment is an indictable nuisance, and the proper officer of the commonwealth may proceed in the name of the public, by bill in equity, for an injunction or relief, or by other appropriate action or proceedings to vindicate the rights of the public against encroachment or denial by individuals. So when, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, it may, in its corporate name, institute judicial proceedings to prevent or remove obstructions thereon"; citing *People v. Vanderbilt*, 26 N. Y. 287; *State v. Mobile*, 5 Port. 279; *Pittsburg v. Scott*, 1 Pa. St. 309; *Mankato v. Willard*, 13 Minn. 13; *Dummer v. Jersey City*, 20 N. J. L. 86. In this case, there can be no question as to the dedication of this street, and its formal acceptance; and the question upon which the dispute arises is as to the location of the true line, in the first place, and if that should be determined in favor of the city, the right to the strip in dispute is claimed upon the ground of adverse possession and long use in the appellant. Upon both of these points the case is clearly against the appellant. The first is, as a question of fact, established against him, and the dedication being established, his encroachment was a nuisance, which is not helped or aided by lapse of time. Upon principles stated above, and well settled by decisions in this and other courts (*Harris v. Commonwealth*, 20 Gratt. 833; *City of Norfolk v. Chamberlaine*, 29 Id. 534; *Dovaston v. Payne*, 2 Smith's Lead. Cas. 142; *City of Cincinnati v. Lessee of White*, 6 Pet. 431; *Commonwealth v. McDonald*, 16 Serg. & R. 290; *Landing v.*

City of Philadelphia, 16 Pa. St. 79; *Mayo v. Murchie*, 3 Munf. 358), the injunction in this case was properly dissolved, and the decree of the circuit court of Fauquier so deciding, is plainly right, and must be affirmed.

STATUTE OF LIMITATIONS. — No title can be acquired in the public streets or highways by adverse possession. Public rights are not destroyed by long continued encroachments or permissive trespasses: *Commonwealth v. Moore head*, 118 Pa. St. 344; 4 Am. St. Rep. 599. The occupation of a portion of a highway by an individual is a mere nuisance, for which no lapse of time will give title or right: *Driggs v. Phillips*, 103 N. Y. 77; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160, and note 161; and compare *Moore v. Roberts*, 64 Wis. 538.

PERKINS v. JONES.

[84 VIRGINIA, 358.]

OLOGRAPHIC WILL. — UNSIGNED CLAUSE OF ATTESTATION following the signature to an olographic will does not create any presumption that the testator did not intend it to have effect as his will. The will was complete when signed, and even if the clause of attestation was added with the intent of revoking the will, it cannot be permitted to have that effect, for the reason that the revocation of a will must be executed with the same formalities as the will itself.

CODICIL TO OLOGRAPHIC WILL. — A PAPER FOUND INCLOSED IN AN OLOGRAPHIC WILL, and executed with all the formalities requisite for a will, and testamentary in its character, must be admitted to probate as a codicil to the first will, though it contains no reference thereto.

PROCEEDING for the probate of a will. The probate was denied both in the county and circuit courts. Thereupon the propounder obtained a writ of error.

Davis and Harman, for the plaintiff.

S. V. Southall and S. B. Woods, for the defendant.

LACY, J. This case is a contest concerning the will of Jesse W. Jones, of Albemarle County, who died on the thirty-first day of May, 1886. In September, 1886, on the sixteenth day of that month, the will was found upon the premises of the testator, among a large quantity of papers, in an outhouse, where the papers had been piled preparatory to a change of occupancy of the premises. These papers were at first in an old trunk, into which such a quantity of the said papers had been put and the top so pushed down as to burst the top off; and the papers being subsequently turned out of

the trunk, as is supposed, this paper was found on the top of a large pile of the said papers. The will is dated the fourteenth day of May, 1862; is wholly in the handwriting of the testator; is signed and sealed by him. At the bottom is an attestation clause unsigned by witnesses. Folded up in the will was a short paper-writing, dated on the same day that the will is, and signed by the testator. This also is wholly in the handwriting of the testator, as is proved in the case, and a newspaper slip containing an obituary notice was also folded up in the will.

The will makes an unequal disposition of the property among the testator's children in some respects, and its probate was resisted by all the children aforesaid, except one, who is the wife of the executor named in the will, who is the propounder of the same, and is the appellant here, John W. Perkins. The county court rejected the will; and on appeal to the circuit court, the case was tried, and the will again rejected; whereupon the case was brought here by writ of error. The facts proved are certified, and it appears to have been proved that the will, and the inclosed paper claimed to be a codicil, are both, including the signatures, wholly in the handwriting of the testator; that the testator was seventy-three years of age at the time of his death, and that he was for some months next preceding his death in delicate health, but that his mind was unimpaired.

The first assignment of error here is the refusal of the court to give the following instruction asked by the plaintiff, the propounder of the will: "If the jury believe, from the evidence, that the paper writing No. 1 [the will] offered for probate is altogether in the handwriting of Jesse W. Jones, and signed by him, they must find that said paper-writing is a good and valid last will and testament, provided they also believe, from the evidence, that the said Jesse W. Jones was of sound and disposing mind and memory at the time he made said writing; and the fact that there is an unexecuted attestation clause at the foot of said writing No. 1 is not sufficient to invalidate the paper as a will, if its body and signature are in the handwriting of the said Jesse W. Jones." The court, in lieu of the foregoing instruction asked for by the plaintiff, gave the following: "The court instructs the jury, — 1. That although they may believe, from the evidence, that paper No. 1 is wholly in the handwriting of Jesse W. Jones, and signed by him, yet having an attestation clause thereto annexed, but without wit-

nesses, the law from this fact creates a presumption against its being a will; which presumption is, however, slight, but yet must be rebutted by some extrinsic evidence before it can be held to be a will."

Our statute (Code Va. 1873, sec. 4, c. 118) provides as to the execution of wills as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence, or by his direction, in such manner as to make it manifest that the name is intended as a signature; and, moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." It thus appears that by our law a will wholly written by the testator, and signed by him in such manner as to make it manifest that the name is intended as a signature, is complete without attestation. Without the attestation clause, signed by witnesses, or unsigned by them, the will is valid and complete.

We are, therefore, not to consider the question whether a presumption is raised by an unsigned attestation clause against an imperfect and otherwise incomplete will; that is not the question which arises in this case. There is no instrument otherwise incomplete which is to be affected by this unattested clause. The will must be conceded to be as perfect and complete under our law before the attestation clause was written as after it was written, unless the unattested clause so affects it as to render it invalid in some degree. Starting from this point, we will consider, then, what effect did the said attestation clause unsigned have upon this complete will.

It must be conceded that the signature to this will is so written as "to make it manifest that it is intended as a signature." It could obviously have been intended for nothing else. It is the testator's signature, and it is recognized as such in the body of the paper in due form. The statute, then, having been complied with in all respects, and the will complete, what presumption arises? — what effect is produced on this complete instrument by the addition of the clause in question? The presumption is, and the probable intention of the testator was, to have the will attested when this clause was written. If he had done so, he would have added nothing to what was already complete. Not having done so, is the will

invalidated by this failure to carry out this unnecessary intention?

The testator must have intended one of these things: either to have carried out his first purpose, and failed by intention or accident; to have changed his intention upon becoming aware that his first purpose was unnecessary; or to have held the purpose unexecuted in his mind. Before it was done, or after it was done, the will was complete. It was an act, immaterial in itself, to effectuate or destroy the will. Suppose we concede, for the sake of the argument, that he put the unexecuted clause on the paper with the distinct purpose of revoking it, would his action have had that effect, even if he had so intended? Our statute again provides on this point in the eighth section of the same chapter as follows: "No will or codicil, or any part thereof, shall be revoked, unless under the preceding section [seventh section, which provides for revocation by marriage], or by a subsequent will or codicil; or by some writing declaring an intention to revoke the same, and executed in the same manner in which a will is required to be executed; or by the testator, or some person, in his presence and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto, with the intent to revoke." The statute must be complied with as completely in order to revoke a will as it must be in order to make a valid will. At an early day in our history, the legislature ingrafted upon the English statute of wills a provision which dispensed with subscribing witnesses in cases of wills wholly in the handwriting of the testator, as the statute either in England or this state did not provide where the will should be signed, whether at the bottom or top, or elsewhere. It was held in some cases that a signing anywhere in the will was sufficient. Under the English statute (29 Car. II.) of course such a will had to be attested by witnesses, whether wholly written by the testator or not, as the statute required that it should be in writing, signed by him or by his direction, and that it should be attested and subscribed by three or more credible witnesses in his presence; and this view was acquiesced in in England until the statute of 1 Victoria, which required that wills should be signed at the end thereof. In this state, as we have seen, no witnesses were required to a will wholly written by the testator; and although our courts showed a disposition at one time to follow the English view as to the sufficiency of a signature anywhere on the paper

(*Bailey v. Teackle*, Wythe, 173; *Selden v. Coalter*, 2 Va. Cas. 553), the publication required in England in such cases being absent under our law, the view was questioned, and finally denied, as the proof of finality of intention might be altogether wanting in an unsigned and unattested will; recited in the case of *Waller v. Waller*, 1 Gratt. 454; 42 Am. Dec. 564.

Such a will coming under consideration, it was held in this court that a will unsigned and unattested was lacking in evidence of finality of intention, and the will in such guise was rejected. The legislature thereupon amended our statute so as to bring it plainly in accord with this decision, and it was required that the will should be signed in such manner as to make it manifest that the name was intended as a signature. Judge Allen said, in *Waller v. Waller*, *supra*: "But in olograph wills, signing does accomplish another and most important object. It furnishes the proof, and generally the only proof, of which the fact is susceptible,—that the act is a complete concluded act. Where an instrument is produced, proved to be in the handwriting of the deceased, showing upon its face that it was a concluded instrument, with his name subscribed at the end thereof, the sanity and freedom of the testator being proved, is not the proof complete? Does it not close the door upon any parol proof as to any change of testamentary intent as fully and effectually as the proof of the due execution, publication, and attestation of an attested will does?" This case was decided in 1845, and the law of this state at that time required wills of personalty to be executed and attested in the same manner as wills of real estate (Act of February 20, 1840; Acts 1839–40, c. 57, sec. 2), which by the act of March 4, 1835 (c. 60, sec. 1, p. 43, Acts 1834–35), unless wholly written by the testator, were required to be attested by two or more credible witnesses in his presence; and it was provided by the same act that the will should be signed by the testator, in case of an olograph will, and otherwise, by some person in his presence and by his request.

At our revisal in 1849, the revisors recommended, as they say, in conformity to the decision in *Waller v. Waller*, *supra*, an amendment to the section, the words, "in such manner as to make it manifest that the same is intended as a signature," which, in their opinion, was thought better than an arbitrary rule requiring the signature at the end of the paper: Report of Revisors, 516, c. 122, sec. 4. This section was adopted by

the legislature, as to this, as recommended, though otherwise changed: Code of 1849, c. 122, sec. 4, p. 516.

In the case of *Waller v. Waller*, *supra*, Brooke, J., dissented, but four judges rejected the will. Only three assign their reasons, but these concur in rejecting the will because it did not manifest a finality of intention. Since the act of 1849, *supra*, the case of *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438, was decided in this court (in 1857). In that case, which was concerning an olograph will, the only question raised and decided was as to the sufficiency of the signing, where the name of the testator appeared in the beginning only, as, "I, Thomas Ramsey, of C., do make this my last will and testament," etc. The court held that the signing at the top alone was an equivocal act, and the will was rejected because the requirements of the statute were not complied with, and the will was not signed in such a manner as to make it manifest that the name was intended as a signature.

In Jarman on Wills, as to execution of wills (vol. 1, p. 77), in the first note, it is said: "It should be observed at the outset that though a will be not properly executed as a will, with subscribing witnesses, it may still be good as an olograph, when that kind of will is allowed, if it answers the requirements of the statutes as to olographs, though it contain more than the statute requires"; that something more than the statute requires doubtless referring to an unexecuted attestation clause, as the case of *Brown v. Beaver*, 3 Jones, 516, 67 Am. Dec. 255, is cited. In that case, the attestation clause was signed by only one competent witness, one being rejected as incompetent. The will was then proved as an olograph will, and the will was sustained, the court saying: "Going beyond the requisition in respect to proofs cannot annul that which comes up to them."

The cited case of *Harrison v. Burgess*, 1 Hawks, 384, is to the same effect. The will, having a defective attestation, was nevertheless proved and sustained as an olograph will.

The case of *Hill v. Bell*, Phill. (N. C.) 122, 93 Am. Dec. 583, decided in the supreme court of North Carolina in 1867, was the case of an olograph will which had appended to it an attestation clause which was unsigned by witnesses, as in this case. The first objection urged against the will was, that it contained an unsigned attestation clause, and it was claimed that the testator intended to make and publish it as an attested and not as an olograph will, and therefore it was never so completed as to operate as a will. This objection

was overruled upon the authority of *Harrison v. Burgess*, and *Brown v. Beaver*, *supra*. The court said: "The declaration made by the decedent in the present case, that he wished to obtain the subscription of witnesses to his will, though strengthened by an attestation clause, cannot be of more avail against its validity than was the actual attestation in the cases referred to."

By the statute in that state an olograph will is required to be in the handwriting of such deceased person, with his name subscribed thereto, or inserted in some part of such will, and the will shall be proved by three credible witnesses to be entirely in his handwriting (Rev. Code N. C., c. 119, sec. 1, p. 606); and when these and other requisites of the statute as to deposit, etc., have been complied with, such wills have been sustained, notwithstanding the design may have existed in the testator's mind to go further and have it witnessed, and this upon the ground that all had been done which the statute required to be done, and that more could not lawfully be required.

In the case of *Devecmon v. Devecmon*, 43 Md. 335, decided in the court of appeals of Maryland in 1875, the will contained an unsigned attestation clause, and purported to devise both real and personal estate. The incompleteness of the will, in that the attestation clause was not signed, was held to raise a presumption against it, and that this presumption was strengthened because the instrument purported to dispose of real estate as well as personal property. Although wholly in the handwriting of the deceased, it was incomplete to dispose of real estate, without witnesses, under the law of that state: Maryland Code, art. 93, sec. 301. This will was, therefore, upon its face incomplete, and therefore the finality of intention not appearing upon the will, it was necessary to prove it, which was done, and the will admitted as a will of personal estate. It was void as a will to pass real estate, as we have seen.

In the case of *Plater v. Groome*, 3 Md. 134, the court said: "When a paper is unfinished, the presumption of law is strong against it; and if there be added to the paper the attestation clause, and the names of the witnesses be omitted, and the signature of the testator be wanting, and the blanks remain unfilled, these circumstances will raise a presumption that the deceased had either abandoned his intention of executing the instrument, or that he never fully made up his mind on

the subject." These cases, and all similar cases, are widely different from this case, and are readily distinguished. They are cases where something essential remained to be done. In a case where a will purports to devise real and personal estate, and the will is incomplete, imperfect, so as to devise both, the fact that all has been done which is necessary to pass one species of property does not disturb the presumption against the finality of the intention. It is, nevertheless, an incomplete instrument. The finality of intention applies to the will, not to any particular species of property devised. The intention not appearing in such case upon the face of the will, the paper is insufficient, standing alone.

But if the question to be determined is as to the finality of intention, what presumption of this sort could a court discover when the whole will, standing alone, and considered as a whole, indicated and exhibited a complete achievement of every purpose manifested therein? And so the same court which decided the case of *Devecmon v. Devecmon*, 43 Md. 335, had already rendered a decision sustaining a will with an unattested attestation clause, the intention of the testator being complete, so far as the will manifested any intention, without the attestation clause either signed or unsigned by witnesses (*Brown v. Tilden*, 5 Har. & J. 371), this being a case of personal estate only; while in the case of *Barnes v. Syester*, 14 Md. 509, which was signed and sealed, with an attestation clause unsigned, this being a will of real estate as well as personal estate, the will was rejected. Without witnesses, the will was ineffectual to operate, as to the whole design of the testatrix as evinced in the will, and a presumption was held to arise as to the finality of intention as to any part. It was not, and is not, reasonable to presume that a testator's purpose is less definite as to the disposition of one species of property disposed of therein than as to any other. The question is not in any case whether the will is sufficiently executed to dispose of something mentioned therein, but whether it is, as a will, executed in accordance with the requirements of the law; and as to this state the requirements of the law are the same as to both species of property mentioned; and "when the formalities are present which the law requires, parol testimony cannot be heard against the will."

The learned counsel for the appellees cites numerous authorities to support the decision of the circuit court in this case. Of them, so far as they have not already been considered,

we will say that they do not apply to this will. Judge Tucker is referred to as saying: "In like manner the completion of the declaration of the testator's intentions must sufficiently appear, or the instrument sought to be established will not be sustained"; and after speaking of the presumption raised by an unattested attestation clause, and other circumstances, he says: "And of all this, the reasons are obvious, since as long as the testator leaves incompleted what he contemplates to complete by a further act, he himself cannot look upon the act as final. If with power to complete it, he fails to do so, we have the most irresistible evidence that his mind had not finally decided." If these views of this learned author (so justly extolled by counsel) are read as of the time he wrote, we will observe that he bases his remark on the question of finality of intention in the execution of the paper; and the provision of the statute of 1849 was not then a part of our law. Now, if the will be so signed as to make it manifest that the name is intended as a signature, the act is complete, and we find the same author saying (chapter 19, book 2, page 292): "2. But if the testamentary paper be not subscribed by the testator, and on the face of it there appears an intention to make some other devise, or to do some other act which is not done, it will be considered as wanting that character of finality and that conclusiveness of intention which are requisite to make a will, and it ought not to be admitted to probate as such." The case of *Beatty v. Beatty*, 1 Addis. 60, is much relied on by the appellees, and the first instruction given by the circuit court was doubtless based upon this case; for the court held that the will would have been clearly entitled to probate but for the unsigned attestation clause, saying: "But if a testamentary paper be imperfect, either in itself or in the writer's apprehension of it, it can only be entitled to probate on proof being furnished of his having been prevented by the act of God from completing it; and this presumption was held to be slight." To a similar effect is *Doker v. Goff*, 2 Id. 42, in which there is a *quære* whether a paper so circumstanced can in all cases be considered an unfinished paper, the word "witnesses" being so written as to leave no room for names of witnesses beneath, and the whole question was made to turn upon the idea of finality appearing upon the paper. *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564, was a case of real and personal property, and has been already sufficiently consid-

ered along with the Maryland case,—*Devecmon v. Devecmon*, 43 Md. 335.

In all these and such similar cases as we have examined, the ground was taken that the conclusion of finality was excluded when the paper appeared to be unfinished. When this was held as to wills like that in *Waller v. Waller* and *Devecmon v. Devecmon*, *supra*, the will was incomplete to effectuate the whole design contemplated by the testator, and a presumption arose. In cases like *Beatty v. Beatty* and *Brown v. Tilden*, *supra*, where personal property alone was concerned, the decisions are not uniform. In the first case, the English court held the testamentary paper invalid. In the second, the Maryland court of appeals held the testamentary paper valid on its face, notwithstanding the want of signature and the blank attestation clause, "the signature not being required by the law of that state to such a will."

In neither England nor Maryland do the provisions of our statute obtain. In the absence of such provisions, much is left to depend in all cases upon the appearance of the paper as to this question of finality. But when certain formal tests are provided by statute in the presence of these, what inference can arise as to finality of intention? As was said by this court in *Waller v. Waller*, *supra*: "When the formalities are present, parol testimony cannot be heard against the will, for that would be to hear parol testimony against the statute." "And on the other hand, would any degree of proof short of the formalities prescribed," etc., "suffice, though aided by the strongest proof of testamentary intent?" "When the formalities are absent, parol testimony cannot avail to supply their place." Our statute having prescribed the formalities required, where these exist no further proof can be required; and when a testator has complied with all the law's prescription, and preserved his will in that guise, no indorsements thereon short of the requisites provided for revocation can affect the testamentary character of the paper. If any essential thing remains to be done to complete the entire will, if a signature is necessary, and one is wanting, or if witnesses are necessary to subscribe the attestation clause, and they are wanting, then the failure to complete the will is not explained by the instrument; but where everything has been done which the law requires, everything is complete upon the face of the will, and no presumptions arise from the failure to do a wholly vain and unnecessary thing. The will in this case is com-

plete in all respects, and the soundness and sanity of the testator being established, the judge of the circuit court should have given the first instruction asked by the plaintiff or proponent of the will; and if he had done so, the controversy would have ended there. All that we have said applies with equal force to the codicil; that also comes up to the requirements of the law in all respects, and the question of how far it affects or modifies the will becomes a question of construction, and is not one of probate.

The codicil is such a paper, under the proofs, in this case stated above, as must be admitted to probate. Its testamentary character is unquestionable. It is dated the same day the will is, and is on different colored paper; but it cannot be from this determined that it was written before the will. It is evidently intended as a codicil, and was so preserved with the will.

We think the circuit court of Albemarle erred in rejecting the first instruction of the plaintiff, and in giving the first instruction given by the court; and for that error its judgment appealed from here will be reversed and annulled, and the case remanded for a new trial, to be had therein in accordance with the foregoing views. This disposes of and includes all the questions raised on the trial which remain of any importance in the case, and the remaining questions will not be reviewed in this court.

LEWIS, P., dissented on the ground that the presence of an unsigned clause of attestation demonstrated that the testator regarded the will as unfinished, and therefore inoperative.

OLOGRAPHIC WILLS. — It is not a sufficient signing of an olographic will for the testator to write his name at the commencement thereof, unless it appears affirmatively from something on the face of the instrument that the testator meant that to be his signature: *Roy v. Roy*, 16 Gratt. 418; 84 Am. Dec. 696, and note 699; *Ramsey v. Ramsey*, 13 Gratt. 664; 70 Am. Dec. 438, and note 442; *Waller v. Waller*, 1 Gratt. 454; 42 Am. Dec. 564, and note 571-573. An unattested codicil, though wholly in the handwriting of the testator, cannot bring into operation as a will a paper which is neither in the handwriting of the testator, nor attested as required by the statute: *Sharp v. Wallace*, 83 Ky. 584.

VIRGINIA MIDLAND RAILWAY COMPANY v. WHITE.

[84 VIRGINIA, 498.]

RAILROADS — CONTRIBUTORY NEGLIGENCE. — PERSON TRAVELING ON OR ACROSS THE TRACK OF A RAILWAY in a frequented part of a city is not negligent because he relies on the performance of their duties by the agents of the railroad company.

RAILROAD COMPANY IS GUILTY OF NEGLIGENCE WHEN, IN DISOBEDIENCE OF AN ORDINANCE of a city, it backs a train along a frequented track in such city at a rate of speed forbidden by such ordinance, without ringing any bell, or giving any other signal of its approach.

RAILROADS — NEGLIGENCE. — USE OF ORDINARY CARE BY THE ENGINEER after he discovered the danger in which the deceased was placed will not relieve the company from liability, if the engineer was guilty of negligence in running his locomotive in a frequented part of the city at a rate of speed forbidden by its ordinance, and without ringing any bell or giving any signal to warn travelers of approaching danger.

CONTRIBUTORY NEGLIGENCE, WHEN INSUFFICIENT TO PREVENT RECOVERY. — Mere negligence or want of ordinary care will not disentitle plaintiff to recover, unless it is such that, but for it, the misfortune could not have happened; nor if the defendant might, by the exercise of care on its part, have avoided the consequences of the negligence and carelessness of the plaintiff.

RAILROAD. — DUTY OF RAILROAD COMPANY TO THE LICENSEE ON ITS TRACK is to exercise toward him ordinary care and prudence.

RAILROAD. — ONE MUST BE TREATED AS A LICENSEE, AND NOT AS A TRESPASSER, on the tracks of a railway, when they have been for years used by the public as a foot-path between certain points, with the acquiescence of the company.

INSTRUCTIONS TO JURY MAY PROPERLY BE REFUSED, EVEN THOUGH CORRECT IN POINT OF LAW, when other instructions are given which cover the case, and properly submit it to the jury.

VERDICT WILL NOT BE SET ASIDE ON THE GROUND THAT THE DAMAGES AWARDED WERE EXCESSIVE, where the action is to recover compensation for the death of one who left a widow and a number of infant children, unless the amount of the verdict is such as to warrant the belief that the jury were influenced by prejudice or partiality, or misled by some mistaken view of the merits of the case.

ACTION of trespass on the case, brought by the administrator of W. H. White, to recover for his death, which it is alleged was brought about by the negligence of the defendant in the operation of its railway. Verdict and judgment for the plaintiff.

Kirkpatrick and Blackford, for the plaintiff in error.

Edward S. Brown, P. W. McKinney, and J. P. L. Fleshman, for the defendant in error.

LEWIS, P. This was an action in the corporation court of the city of Lynchburg, brought under the statute, to recover damages for the alleged negligent killing of the plaintiff's

intestate by the defendant, the Virginia Midland Railway Company. The deceased was killed by being run over by a yard-engine of the defendant, in its yard, within the corporate limits of Lynchburg, on the 12th of May, 1885. At the trial there was a verdict for the plaintiff for five thousand dollars damages; whereupon the defendant moved to set aside the verdict, and for a new trial, on three grounds: 1. Because the verdict was contrary to the law and the evidence; 2. Because the court had misdirected the jury; and 3. Because the damages awarded were excessive. But the court overruled the motion, and gave judgment on the verdict; whereupon the defendant obtained a writ of error and *supersedeas*.

The bill of exceptions contains a certificate of the evidence, which was conflicting, and all of which was parol, so that, in passing upon the questions of fact in the case, we can look to the evidence of the plaintiff only. And unless the verdict, when viewed in this light, be plainly wrong, the judgment must be affirmed, provided the exceptions to previous rulings of the court in the progress of the trial be not well taken.

It appears, from the record, that, on the morning of the day on which he was killed, the deceased went to the house of a Mr. Field, in Lynchburg, where he had engaged to do certain work as a brick-mason. He was a resident of Amherst County, and went to Lynchburg the previous day. He was a brother-in-law of Mrs. Field, and frequently visited her. Field was an employee of the defendant company, and occupied one of its houses, rent free, where he boarded a number of the company's hands. The house is situate on the company's land, at the foot of a steep bluff. A short distance north of it, and around the bluff, is the railroad bridge across James River, the northern boundary at that point of the city, and about a quarter of a mile south of it is the Union depot in the city.

The house fronts immediately on the company's tracks; at which point there are four tracks,—three side-tracks and the main track. There is no other foot-path from the house, nor indeed from the railroad bridge to the depot, than over these tracks, which it seems have been used for years by pedestrians going from the Field house and other places in its vicinity to the depot and other business portions of the city. This user by the public has been with the acquiescence of the company. Without passing over the tracks, the Field house is virtually inaccessible.

Beyond the curve, and near the bridge above mentioned, is a water-tank, which, owing to the bluff, is not in sight from a point on the tracks opposite the Field house. Soon after arriving at the house, the deceased inquired for Mr. Field, and was informed that he had gone down the track in the direction of "the sand-house," near the depot; whereupon he started out to find him. He stepped on one of the side-tracks in front of the house, and walked in the direction of the sand-house, but had not gone far, when, seeing a freight train moving northward and approaching him on the same track, he got upon the main track, and after proceeding on the latter track about seventy yards, he was suddenly struck and instantly killed by a yard-engine and tender, moving backwards in the direction he was walking, the tender being in front. This engine was at the water-tank above mentioned when the deceased got upon the track at the Field house, and consequently was not then visible to him. And, according to the evidence for the plaintiff, no signal was given, by ringing a bell or otherwise, to warn persons of its approach, either when it left the water-tank, or in coming around the curve, or afterwards at any time before the deceased was killed.

One of the plaintiff's witnesses, who says it "thundered" by him, about thirty or forty yards from the deceased, testifies as follows: "I do not think the engineer and fireman on the engine were aware that he [the deceased] was on the track. I don't think they saw him. I did not see them looking out towards him. There was no watchman on the tender, and neither bell was rung nor whistle blown. I had to be pretty peart myself to get out of the way." The same witness also testifies: "I knew the track pretty well. Persons were in the habit of passing along it very frequently. They passed mighty nigh as much as on the streets. Persons from Amherst were in the habit of passing along the tracks." He also said: "I know the position of the Field house. I do not suppose it is more than a foot and a half from the step to the outside rail. There was no entrance to the house except from the track that I know of, because there is nothing but a bluff on the other side. It has been the custom of people to pass along that track as long as I can recollect. I was well acquainted with the deceased. I think his ordinary faculties were perfectly good. As to his hearing, I have talked to him very often, and I never talked to him louder than to any other person."

There is some conflict in the evidence of the plaintiff as to

the speed at which the engine was backing when the deceased was killed. Several of the witnesses say it was moving rapidly, one of them estimating its speed at about the rate of eighteen or twenty miles an hour, another at about ten. The latter estimate, we think, is established as the correct one by the preponderance of the testimony.

One of the general ordinances of the city of Lynchburg provides as follows: "Every locomotive moving upon any railway track in the city shall have attached thereto a bell weighing at least twenty pounds, which shall be run so long as such engine is moving in the city, nor shall any such locomotive be moved at a greater speed than four miles an hour."

This summary of the principal facts established by the plaintiff's evidence shows a clear case for the plaintiff, unless the deceased was guilty of such contributory negligence as to defeat a recovery. The defendant contends that he was. It contends that it was negligence on his part not to look and listen for the approaching engine; but there is no evidence that he did not. The engine was not in view when he got on the side-track, and the evidence does not show that it had rounded the curve and come in view when he left the side-track and got on the main track. He had a right to rely on the performance of their duties by the agents of the defendant, and to suppose that in a frequented place within the city limits, as the evidence shows the company's tracks in the vicinity of the fatal spot to have been, they would obey the ordinance above mentioned, both as respects the signals and the speed it prescribes. By their failure to do so, they doubtless lulled him into a fatal belief of security, and there can be but little doubt that had they performed their duties, the deceased would not have been injured. It was gross negligence on the part of the servants of the company in charge of the yard-engine to have neglected to give the necessary signals, and to have moved a backing engine with a tender before it at the high rate of speed at which the evidence shows the engine was being propelled when the deceased was killed. They ought to have exercised greater precaution to avoid danger to human life in such a locality; and for their failure to do so, the company is liable. In other words, their negligence was the proximate cause of the injury, even though the deceased may not have been entirely without fault: *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455; *Northern Cent. R. R. Co. v. State*, 29 Md. 421.

It is contended, however, that the court below erred in refusing to give to the jury certain instructions asked for by the defendant, and in giving certain other instructions in lieu thereof. The defendant asked for eight instructions, all of which, except the second, were refused. The first is as follows: "If the jury believe, from the evidence, that the plaintiff's intestate was killed by the engine of the defendant company while he was walking on one of the tracks of the defendant in its yard in the city of Lynchburg, the plaintiff cannot recover for such injury, unless he proves to the satisfaction of the jury that the engineer controlling the engine by which the deceased was killed, after he discovered the danger in which the deceased was placed, could, by the use of ordinary care, have prevented the accident."

This instruction was properly refused. Its vice is, that it ignores the duty of the engineer, or of those who were controlling the engine, to have exercised ordinary care and diligence in keeping a lookout to avoid injuries to the deceased, and, if given, would have in effect told the jury that, notwithstanding the engineer may have been guilty of gross negligence in running the engine, yet the company was not liable, if, after discovering the deceased, he used ordinary care to prevent the accident. Such is not the law. It was the duty of the engineer to use ordinary care, not only after discovering the dangerous position of the deceased, but in keeping a lookout to warn him of the approaching danger. The law applicable to such a case is accurately laid down in *Tuff v. Warman*, 5 Com. B., N. S., 573, where the qualification of the general rule relating to the effect of contributory negligence is thus stated: "Mere negligence or want of ordinary care or caution would not, however, disentitle him [the plaintiff] to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff."

This statement of the law, though it has been criticised and disapproved by some courts, notably in *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390, has received the sanction of the house of lords in subsequent cases, and is undoubtedly the established doctrine of this court: *Richmond etc. R. R. Co. v. Anderson's Adm'r*, 31 Gratt. 812; 31 Am. Rep. 750; *Dun v. Seaboard etc. R. R. Co.*, 78 Va. 645; 49 Am. Rep. 388; *Shenan-*

doah Valley R. R. Co. v. Moose, 83 Va. 827. And if in any of the decisions of this court there be any language in apparent conflict with the doctrine, such language must be construed with reference to the particular circumstances of the cases with which the court was dealing.

The second instruction asked for by the defendant was given by the court, and will be referred to presently.

The third instruction asked for is as follows: "The defendant corporation has the legal right to the full, free, exclusive, and uninterrupted use of its tracks and yards for the conduct of its business, and strangers who go into said yards and upon such tracks for their own convenience assume all the risks of injury which may arise therefrom, and are bound to use the highest degree of care and caution to avoid such injury; and if so injured, no damages can be recovered therefor, unless it be shown that the defendant company, after it discovered the danger, could have prevented the injury by the use of ordinary care and diligence."

The last proposition contained in this instruction is obnoxious to the objection already indicated in respect to the first instruction, and is, moreover, objectionable in another point of view, which is this, namely, that it in effect assumes that the deceased, in entering the yard and walking on the tracks of the defendant, was a stranger, by which evidently was meant a trespasser. But the evidence shows that this is a mistaken idea; so that in this particular the instruction was not relevant to the case, and an irrelevant instruction ought not to be given: *Railroad Co. v. Moose*, *supra*, and cases cited.

The deceased was not a trespasser, but a licensee; and whatever duty a railroad company may owe to a trespasser on its tracks (as to which see *Norfolk etc. R. R. Co. v. Harman's Adm'r*, 83 Va. 553), a different rule applies to a licensee. As to the latter, the rule is, that the company is bound to exercise ordinary care and prudence toward him, for the license creates this duty: Beach on Contributory Negligence, sec. 17, p. 54.

This subject was very fully and ably considered by the supreme court of Wisconsin in the recent case of *Davis v. Chicago etc. R'y Co.*, 58 Wis. 646; 46 Am. Rep. 667; 15 Am. & Eng. R. R. Cas. 424. In that case the plaintiff, while on the premises of the defendant company as a licensee, was injured by the explosion of a steam-boiler. The explosion was occasioned by the negligence of the defendant's agents, and it was held that the action was maintainable. The court, after an

examination of many of the authorities, recognized the rule above mentioned, saying that in the case of a mere trespasser, the company or its servants have no cause to anticipate that he will be on its track or in the way of danger, and therefore that a mere neglect to keep a lookout may not be such neglect as will render the company liable for running upon and injuring him. But that in a case where the company knows that a portion of its premises is constantly used by the public, with its acquiescence, as a foot-way, its servants are charged with notice that it will be so used, and they cannot, without fault, proceed in a manner which must necessarily be dangerous to such persons, and that a plaintiff injured by the failure of the company's servants to observe this duty need not aver and prove gross negligence on their part.

And referring to the case of *Townley v. Railroad Co.*, 53 Wis. 626, which was an action to recover damages for injuries caused by the negligent running of a switch-engine, it was said: "It was taken for granted in that case that although the plaintiff was on the defendant's track simply by its license or acquiescence, yet that it owed a duty to such licensee to exercise ordinary care in running its trains and engines, and that if an injury was inflicted by reason of the want of such ordinary care, then the defendant was liable."

It was also said—and the remark is applicable to the present case (Acts 1883–84, p. 705, sec. 7)—that a statute making it an offense to walk along the track of a railroad company can have no effect in an action for damages against the company, where the proof shows that the law has been constantly violated, with the knowledge and acquiescence of the company,—certainly not as against a licensee who is injured by the carelessness of the company's servants. And in these views we fully concur.

The fourth, fifth, sixth, and seventh instructions which were asked for and refused are faulty for reasons already stated. The court, therefore, did not err in refusing to give them.

The eighth is as follows: "The court instructs the jury that the plaintiff, in order to recover in this cause, is under the burden of proving that the accident, which resulted in the death of William H. White, was the result of the failure of the defendant company to use ordinary care and vigilance to prevent the injury. If the defendant relies for its defense on the contributory negligence of the plaintiff, the burden of proving such contributory negligence rests on the defendant com-

pany. If the plaintiff claims a right to recover in this case, notwithstanding the contributory negligence of said White, on the ground that the defendant company could have prevented such accident, notwithstanding such contributory negligence, then the burden of proving that the accident could have been so avoided is on the plaintiff."

There is certainly nothing in this instruction which states the law too favorably for the defendant, and it is not easy to see why it should have been refused. The court, however, did refuse to give it; and its refusal would undoubtedly be ground for reversing the judgment, but for the fact that in the second instruction asked for by the defendant, and which was given, the jury were substantially told what was asked for in the eighth instruction, and in even more favorable terms for the defendant; so that by the refusal of the court to give the last-mentioned instruction the defendant has not been prejudiced. "It is well settled that when instructions are given which cover the entire case, and which properly submit the case to the jury, it is not error to refuse to give others, even though in point of law they are correct, though it is safest for the court to give instructions asked for when they correctly propound the law, and are relevant to any evidence in the case": *Cent. Lunatic Asylum v. Flanagan*, 80 Va. 110; *Laber v. Cooper*, 7 Wall. 565; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291.

The instructions given by the court in lieu of those which were offered by the defendant, and refused, propound the law, when taken as a whole, in accordance with the views already expressed, and need not be more particularly referred to or considered.

It only remains to say that the court did not err in refusing to set aside the verdict on the ground that the damages awarded were excessive. The evidence shows that the deceased left a widow and a number of infant children, and the question as to the *quantum* of damages was a matter peculiarly within the province of the jury. In such a case, therefore, the verdict ought not to be set aside, unless the damages awarded are so excessive as to warrant the belief that the jury were influenced by prejudice or partiality, or were misled by some mistaken view of the merits of the case: *Farish & Co. v. Reigle*, 11 Gratt. 697, 722; 62 Am. Dec. 666; *Benn v. Hatcher*, 81 Va. 85; 59 Am. Rep. 645; *Borland v. Barrett*, 76 Va. 128; 44 Am. Rep. 152; *Madison etc. R. R. Co. v. Taffe*, 37 Ind. 373.

• The judgment is affirmed.

EXCESSIVE VERDICTS. — See note to *Stutz v. Chicago etc. R'y Co.*, 9 Am. St. Rep. 769. See case of *Brown v. Sullivan*, 71 Tex. 470, where ten thousand dollars was not excessive for bodily injury; and *Railway v. Aiken*, 71 Id. 373, where a verdict for three thousand seven hundred and fifty dollars was not excessive; and *Railway v. Crenshaw*, 71 Tex. 340, where a judgment for five thousand dollars was not excessive for personal injuries; and *Railway v. Lilliphant*, 70 Id. 625, where a verdict for ten thousand dollars for injuries by reason of a railway's negligence was not excessive to such an extent as to presume prejudice on the part of the jury awarding such amount and thereby cause a reversal of the judgment. But it is the rule that when as a matter of fact damages assessed by a jury are excessive the verdict will be set aside by the appellate court: *Jacksonville etc. R'y Co. v. Roberts*, 22 Fla. 324.

INSTRUCTIONS. — Instructions need not be given in the precise words requested by counsel, even though correct: *State v. Hoaxie*, 15 R. I. 1; 2 Am. St. Rep. 838; *Newby v. Harrell*, 99 N. C. 149; 6 Am. St. Rep. 503; especially if the substance of such instructions has already been given: *Kendrick v. Towle*, 60 Mich. 363; 1 Am. St. Rep. 526. Yet the better practice is to concede requests to charge the jury in the language asked, if they state the law correctly, tersely, and clearly: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870. Where the court has fully and impartially instructed the jury upon the issues, it is not error for it to refuse to give further instructions, though they may state the law correctly: *Hablichtel v. Yambert*, 75 Iowa, 539; instructions the substance of which has already been embodied in the judge's charge to the jury may be properly refused: *People v. Field*, 77 Cal. 147; *Railroad v. Eckford*, 71 Tex. 274; it was not error to refuse instructions asked by counsel, when so much of them as was correct had been given by the court in its charge to the jury: *Van Horn v. Overman*, 75 Iowa, 421; where instructions already given sufficiently present the issues to the jury, it is not error to refuse additional instructions, though correct embodiments of the law, asked by the defendant: *State v. Woods*, 97 Mo. 31; *State v. Pugsley*, 75 Iowa, 742; and so where an instruction asked is relevant to an issue made by the pleadings, but which is not pertinent under the evidence, and the question to which it is applicable has been eliminated from the case by the court, it is not error to refuse such instruction: *Conners v. Burlington etc. R'y Co.*, 74 Iowa, 383; *Wells v. Kavanaugh*, 74 Id. 372. Nor is it error to refuse instructions which, though they state the law correctly, do not touch the issues as made by the evidence in the case: *George v. Swafforel*, 75 Id. 491; *Deeds v. Chicago etc. R'y Co.*, 74 Id. 154; *Rodney v. McLaughlin*, 97 Mo. 426; *Merrett v. Poulter*, 96 Id. 237. And it has been held that the court may refuse to give an instruction if it seems to it to be erroneous, even though it may have previously indicated that it would be given: *Louisville etc. R'y v. Hubbard*, 116 Ind. 193.

CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT PREVENT RECOVERY: See *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note 850; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387, and note 398; *Wichita etc. R. R. Co. v. Davis*, 37 Kan. 743; 1 Am. St. Rep. 275, and note 279; *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note 524; *Kelley v. Inhabitants of B.*, 147 Mass. 448; 9 Am. St. Rep. 730, and note.

CONTRIBUTORY NEGLIGENCE, INSTANCES OF WHAT IS: See note to *Harris v. Township of Clinton*, 8 Am. St. Rep. 850. A man who is *sui juris*, and in the full possession of his faculties, with nothing to disturb his judgment,

who attempts to board a railroad train moving at the rate of from four to six miles an hour, is guilty of contributory negligence as a matter of law: *Hunter v. Cooperstown etc. R. R. Co.*, 112 N. Y. 371. The neglect of the railway employees to ring the bell or blow the whistle on approaching a crossing does not excuse a traveler from exercising care on his part in looking and listening before crossing the railroad tracks: *Cullen v. President etc. of Canal Co.*, 113 N. Y. 667. But where a boy uses the care reasonably to be expected of him, by reason of his young years and capacity, he is not guilty of contributory negligence: *Williams v. Kansas City etc. R. R. Co.*, 96 Mo. 275.

RAILWAYS. — The fact that a railway train was running at a greater speed than was permitted by a city ordinance at the time when it struck and killed a person walking upon the track may be considered by the jury in determining whether the company was guilty of negligence in causing the death of such person; yet it will not relieve him from the exercise of ordinary care, nor will the speed of the train alone afford sufficient reason for holding that the injury was willful on the part of the railway company: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note 638. The violation of a municipal ordinance regulating the rate of speed of trains is negligence *per se*: *Schlereth v. Missouri Pac. R'y Co.*, 96 Mo. 509. The fact that a statute provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate: *Chicago etc. R. R. Co. v. Perkins*, 125 Ill. 127. The giving of signals required by law upon a railway train approaching a street crossing does not, under all circumstances, render the railway company free from negligence, especially where the evidence tends to show that the train was being run at an undue and highly dangerous rate of speed through a city or village: *Thompson v. New York etc. R. R. Co.*, 110 N. Y. 636.

RAILWAYS — TRESPASSERS — WHAT CARE TRESPASSERS ON A RAILWAY TRACK ARE ENTITLED TO: Note to *Blanchard v. Lake Shore etc. R'y Co.*, 9 Am. St. Rep. 637; note to *Kelly v. Michigan etc. R'y Co.*, 8 Id. 876; *State v. Baltimore etc. R'y Co.*, 69 Md. 494; 9 Am. St. Rep. 436, and note; *Stringer v. Frost*, 116 Ind. 477; 9 Am. St. Rep. 875; *Troy v. Cape Fear etc. R'y Co.*, 99 N. C. 298; 6 Am. St. Rep. 522, and note 529.

BEECHER v. WILSON, BURNS, & Co.

[84 VIRGINIA, 813.]

POST-NUPTIAL SETTLEMENT IS PRIMA FACIE FRAUDULENT AND VOID as against pre-existing creditors; and those claiming under it must, to rebut this presumption, prove that it was made for a valuable consideration in good faith, upon a contract coeval or nearly coeval with it.

RESULTING TRUST MUST ARISE AT THE TIME OF THE EXECUTION OF THE CONVEYANCE. A subsequent payment will not, by relation, attach as a trust to the original purchase.

POST-NUPTIAL SETTLEMENT CANNOT BE SUPPORTED AS AGAINST PRE-EXISTING CREDITORS by showing that the husband received moneys of the wife and used them in his business, unless it be also proved that at the time of such reception the moneys were understood to be loaned, and that both husband and wife intended to stand to each other in the relation of debtor and creditor.

PRESUMPTION WHEN HUSBAND RECEIVES MONEY OF HIS WIFE, and uses it in his business, and in the purchase of property in his own name, is, that she intended to give, and not to loan, it to him.

SUIT by Wilson, Brown, & Co. to set aside a post-nuptial settlement made by O. Beecher in favor of his wife. Decree for the complainants. Defendants appeal.

George P. Haw and H. R. Pollard, for the appellants.

Thomas P. Bagby, and Henley and Peachy, for the appellees.

FAUNTLEROY, J. On the twenty-first day of April, 1885, O. Beecher was the owner of a valuable farm in King William County, Virginia, called Riverside, containing 398 acres, which was conveyed to him April 17, 1879, for the purchase price of \$6,870; which farm was well stocked, and upon which the said Beecher erected a valuable dwelling and other improvements. At that time the said O. Beecher was heavily indebted; and on the said twenty-first day of April, 1885, he conveyed 350 acres of the said farm, and all his personal property thereon, including the stock and crops, to his son, O. Beecher, Jr., as trustee, for the separate use of his wife, Angelina Beecher.

On the fourth day of January, 1886, the bill in this cause was filed, charging that the said deed of settlement was without valuable consideration, fraudulent and void, and made with intent to hinder, delay, and defraud creditors, and praying that the said deed be vacated and set aside, and the land settled thereby be sold, and the proceeds applied to the payment of complainants' debts.

The defendants, O. Beecher and Angelina Beecher, his wife, and O. Beecher, Jr., trustee, answered the bill, and denied the allegation of fraud, and averred that the deed was made for a valuable consideration and with *bona fide* intent, in consideration of the money of the wife, Angelina Beecher, having been at various times and ways, set forth in the answer, received, appropriated, and applied by the said O. Beecher to the payment of the purchase-money for the Riverside farm, to the aggregate amount of \$5,900, upon a contemporaneous agreement that she should be properly secured therefor. Depositions were taken; and at the hearing of the cause, the court held the deed of settlement to be without valuable consideration, and made with intent to hinder, delay, and defraud creditors, and therefore fraudulent and void; and from the decree to this effect, this appeal is taken.

The deed of settlement of April 21, 1885, which is attacked by creditors whose debts or claims, against the husband and settler, antedated the deed and are admittedly just, is, in date, in form, in fact, and in every characteristic feature, a post-nuptial settlement; a conveyance by a husband — heavily indebted — of all his property, for the benefit of his wife, which expresses on its face “free of all debts made by himself”; and the value of the property conveyed is far in excess of what is alleged, but not proven, to be due to the wife. Under the repeated early and late decisions of this court, the settlement is, *prima facie*, fraudulent and void as to existing creditors, and presumed to be voluntary, unless those claiming under it can show that it was made for a valuable consideration, in good faith, and upon a contract or agreement coeval, or so nearly coeval, with the appropriation and the settlement as to support the presumption of fair dealing, and to repel the presumption of law that the settlement is a mere resort or contrivance for putting the property of the husband beyond the reach of his creditors: *Blow v. Maynard*, 2 Leigh, 30; *Fink, Brother, & Co. v. Denny*, 75 Va. 663; *Hatcher v. Crews*, 78 Id. 463; *Perry v. Ruby*, 81 Id. 317, 321; and *Robbins v. Armstrong, Cator, & Co.*, 84 Id. 810.

The record shows that Beecher purchased the Riverside farm by deed April 17, 1879, which makes no allusion to or recognition of the wife, or of her having any claim or separate estate; that he took the title in his own name; that he used it as his own exclusive and absolute property; that he sold and conveyed parts of it; and twice conveyed the whole of it by deeds of trust to secure his debts contracted upon the faith of it; and that he took the releases to himself; that he held it and used it and obtained credit upon it as his own for over six years, without ever a suggestion of his wife's interest, until, by deed April 21, 1885 (when he had become heavily indebted), he settles it and all his other property upon his wife, to the exclusion of his creditors, upon the recital in the said deed of settlement (the first intimation) that he had received and appropriated money belonging to his wife at various times previously,—part in 1875 and part in 1883, and the other parts at different times; some of which went to the support of the family, some into his partnership business, and some was used to make the last payments of the purchase-money for the Riverside farm, and for improvements put thereon; but there is no adequate proof, if indeed

there be any whatever, of a contract to repay these moneys. No such contract appears anywhere in the deeds touching this land between the parties; and the only suggestion in the evidence of any such contract, or any contract at all, is in the deposition of the trustee, O. Beecher, Jr., "that there was no understanding at the time they were made directly to her, but it was always agreed that the property should be hers; this was the understanding at the time of the purchase, though nothing was said about it."

Proof of such a contract must be distinct, full, and conclusive, to support the settlement; and there is not even a claim or assertion anywhere in the record that the alleged contract or agreement was in writing. The witness O. Beecher, Jr., trustee, is seriously impugned, by evidence in the record, for want of veracity; but taking his incomprehensible statement above quoted for true, it not only falls far short of proving a specific agreement at the time that the Riverside farm purchased should be the property of the wife, but it cannot be construed into a binding contract, as testified to by this witness, in regard to land, without an utter disregard of the policy and the letter of the statute of frauds: *Blow v. Maynard*, 2 Leigh, 29. By the evidence of appellants' own witnesses, and their own pleadings, Mrs. Beecher permitted her money to go into the hands of her husband, O. Beecher, and be used in his business, and be mixed with his property, and to be applied to the purchase of land in his own name, and to be held and used to give him credit and advantage in his business for a series of years; and, by so doing, it became his own property and liable for his debts: *Kesner v. Trigg*, 98 U.S. 50; *Humes v. Scruggs*, 94 Id. 27. Having constantly consented that he should hold himself out to the world as the absolute owner of this property, and to contract debts on the credit of it, up to the very hour of his insolvency, it would be against the plainest principles of justice and good conscience, and utterly subversive of fair dealing, to permit the wife to step in, at the last moment and after many years, with an unsupported and mere assertion of ownership of the property which she had permitted him to hold and proclaim as his absolute own all the time, and obtain and enjoy credit and business standing thereby, and thus to defraud the just debts due to his honest creditors. When the trust does not arise upon the face of the deed, but is raised upon the subsequent payments of purchase-money to override the deed, the proof must be

very clear, and mere parol evidence ought to be received with great caution: *Bank of the United States v. Carrington*, 7 Leigh, 581.

And if every word as testified to by the witnesses for appellants be true, as to the sums of money belonging to Mrs. Beecher alleged to have been paid by her husband upon the purchase of the Riverside farm, this would not support a resulting trust. The trust must be coeval with the deed, or it cannot exist. "A resulting trust must arise at the time of the execution of the conveyance. A subsequent payment will not, by relation, attach a trust to the original purchaser": *Miller v. Blose*, 30 Gratt. 744. In Bispham's Principles of Equity, 122, it is said: "It is essential to a resulting trust that the money should be paid at the time of the purchase. A subsequent payment cannot raise a trust."

In Bigelow on Fraud, 109, it is said: "After the legal title has been conveyed to one who agreed to buy for another, the application of the latter's money to pay notes for the purchase-money creates no resulting trust in favor of the other. The trust must attach, if ever, at the time of the conveyance," etc.

The simple fact that the husband used the wife's money, as alleged, is not a sufficient consideration to support the deed of settlement, in the absence of proof that, at the time and times the various sums of money were received from the wife, it was understood to be loaned; and that, then and subsequently, both husband and wife recognized it as a debt, and intended to stand to each other in the relation of debtor and creditor: *Bump on Fraudulent Conveyances*, 304; *William and Mary College v. Powell*, 12 Gratt. 372; *Blow v. Maynard*, 2 Leigh, 30; *Campbell v. Bowles*, 30 Gratt. 663.

There is no pretense of such proof in this record; and, in fact, it appears throughout the whole matter that this money was used by the husband, by common consent, as his own, and never was thought of as a debt from him to his wife till subsequent events made it necessary to hide his property from his creditors. The presumption is, that when a wife's money comes into the hands of her husband and is used by him in his business as his own, and to purchase property in his own name, and hold it and use it, and trade with the property so bought and held in his own name, and contract debts upon the faith and credit of his recorded legal title, it is his own property, and she cannot, after years have passed, claim it as her own, and thus enable her husband to consummate a fraud

upon his creditors: *Humes v. Scruggs*, 94 U. S. 22. The presumption is, that she intended to give, and not to loan, the money, even if (as in this case there is not) there be any proof that the moneys did not belong to the husband by his marital right, and that she held any separate estate: 2 Minor, 192; *Miller v. Blose*, 30 Gratt. 744; *Irvine v. Greever*, 32 Id. 411.

The married woman's act secured to married women property "hereafter acquired," — that is, after April 4, 1877; and all the money appropriated by the husband in this case was acquired by the wife long prior to April 4, 1877,—in 1863 and 1875; and the married woman's act does not prevent a wife from giving her property to her husband if she please, nor does it abrogate the presumption that, under circumstances such as obtained in this case, she has done so: *Bain v. Buff's Adm'r*, 76 Va. 374. The decree complained of is plainly right, and we are of opinion that it must be affirmed.

HUSBAND AND WIFE. — The use of a wife's money by a husband with her consent, whereby he obtains credit, estops the wife from asserting her claim as against the husband's creditors: *Driggs v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note 82, 83. Post-nuptial settlements are presumed to be voluntary, and not founded upon any valuable consideration: *Robbins v. Armstrong*, 84 Va. 810. Where a husband has his wife's money in his possession, and invests it in real estate, taking the title in his own name, a resulting trust arises in favor of the wife: *Heath v. Slocum*, 115 Pa. St. 549. Where it is proved that at the time of a gift from a husband to his wife, he had lands subject to execution in excess of his indebtedness, such gift is valid; nor can such gift be avoided by a subsequent creditor by showing that it was without any valuable consideration: *Terry v. O'Neal*, 71 Tex. 592.

RESULTING TRUSTS — CIRCUMSTANCES UNDER WHICH THEY ARISE: Note to *Reynolds v. Summer*, 9 Am. St. Rep. 530, 531. Where lands were purchased by a husband with money belonging to his wife, who took title in his own name, a trust resulted in favor of the wife: *Bigley v. Jones*, 114 Pa. St. 510. Where a purchaser paid for land, took possession, and collected the rents, but the titles were made to another person, a trust resulted to such purchaser: *Seaton v. Hollis*, 26 S. C. 231; *Shaffer v. Fetty*, 30 W. Va. 249.

MULLER'S ADMINISTRATOR v. STONE.

[84 VIRGINIA, 834.]

INJUNCTION WILL NOT ISSUE TO PREVENT A SALE UNDER A TRUST DEED GIVEN TO SECURE THE PAYMENT OF A DEBT on the ground that great financial depression exists, and the property, therefore, will not bring anything near its true value.

DUTY OF TRUSTEE REQUIRES HIM TO USE EVERY REASONABLE EFFORT TO SELL THE ESTATE to the best advantage, and to apply to a court of equity where there is a cloud upon the title or doubt of or uncertainty as to the amount to be raised or as to prior encumbrances, or where there is a conflict between the creditors, and in every case in which the aid of such court is necessary to remove impediments in the way of a fair execution of the trust.

TRUSTEE WILL BE RESTRAINED FROM MAKING A SALE while there is a cloud upon the title, or doubt or uncertainty as to debts secured, or a dispute or conflict among creditors as to their respective claims.

SALE BY TRUSTEE WILL NOT BE ENJOINED TO TAKE AN ACCOUNT OF LIENS ON THE PROPERTY, when the exact amount of the debts and other priorities are already fully known.

BILL in equity to enjoin a sale under a trust deed. The property embraced in such deed was, in June, 1883, conveyed by W. F. Gray and wife to James P. Jeffreys, as trustee, to secure a debt of two thousand dollars owing Thomas G. Stone. Afterwards, George B. Stone, a brother of the creditor, was substituted in place of the original trustee. In August, 1884, the same grantors executed another trust deed to R. R. Campbell to secure the payment of a debt due William Muller. Thereafter, two judgments were entered against the grantors which continued to be liens on the land. The trustee, acting under the first-named deed, advertised the land for sale for cash, in 1886. Both deeds provided that in event of default in payment of the debt secured thereby, the sale should be made by the trustee in accordance with the provision of section 6, chapter 113, Maryland Code. Muller having in the mean time died, his administrator filed a bill to enjoin the sale by the trustee, on the ground that such sale would prejudice the interest of the complainant, because the time was one of great financial depression, and the sale of the property would not approximate near its true value. He also asked that an account of liens be taken, and for general relief. An injunction issued, but it was subsequently dissolved on the ground that there was no equity in the bill. The complainant then amended its bill, and renewed his prayer for an injunction on the grounds, — 1. That the land ought to be sold in parcels; 2. That judgment liens existed, which, until their

relative priority is ascertained, will prevent any intelligent bidding on the land; and 3. That the trustee is a brother of the creditor, and has acted with such bias as to disqualify him from impartially discharging his duties. The injunction granted on the amended bill was also dissolved, and the trustee directed to proceed to sell so much of the land as might be necessary to pay the debt of Thomas G. Stone. The administrator of Muller thereupon appealed.

A. D. Payne and J. V. Chilton, for the appellant.

Hunton and Son, and Brooke and Scott, for the appellees.

LEWIS, P. It is clear that the appellant is not entitled to relief upon the ground set forth in the original bill. If authority for such a proposition were needed, the case of *Muller v. Bayly*, 21 Gratt. 521, is directly in point and conclusive. In that case, the bill alleged that the time for a sale was unpropitious; that money was scarce, and that, owing to the large amount of the cash payment required, the sale, if made as advertised by the trustee, would be attended with great, if not irreparable, loss and injury, etc. But, said the court, "certainly these allegations can afford no just ground for enjoining the sale," and a decree was entered accordingly.

It is contended, however, that upon the allegations of the amended bill, it was error to refuse to direct an account of liens to be taken before the land is sold; and in support of this position, reference is made to *Shultz v. Hansbrough*, 33 Gratt. 567, *Hoge v. Junkin*, 79 Va. 220, and other authorities. We are of opinion that none of these cases apply to the facts of the present case as disclosed by the record.

That a trustee is considered as the agent of both parties, and bound to act impartially between them; that it is his duty to use every reasonable effort to sell the estate to the best advantage; and that it is his duty to apply to a court of equity where there is a cloud upon the title, or where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of his trust,—are propositions which none will deny, and which have been repeatedly affirmed by this court: 1 Lomax's Digest, 323; *Lane v. Tidball*, Gilm. 130; *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle's Ex'r*, 5 Leigh, 460; *Wilkins v. Gordon*, 11 Id. 547; *Miller v. Trevilian*, 2 Rob. (Va.)

1; *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 139; *Rossett v. Fisher*, 11 Gratt. 492; *White v. Mechanics' Building Fund Ass'n*, 22 Id. 233; *Shurtz v. Johnson*, 28 Id. 657; 2 Minor's Institutes, 286; 1 Bart. Ch. Pr. 447.

And it is equally well settled that if the trustee fails in any such case to apply to a court of equity, the party injured by his default may do so. The rule is well stated by Judge Burks in *Schultz v. Hansbrough*, *supra*, as follows: "If a trustee *in pais*, with power to make sale of real estate for the payment of debts, attempts to make such sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by the debtor, secured creditor, subsequent encumbrancer, or other person having an interest, will restrain the trustee until these impediments to a fair sale have, by its aid, been removed as far as it is practicable to do so."

These principles, we repeat, are too well settled to be controverted. But it is not the duty of a trustee in every case to invoke the aid of a court of equity before making a sale of the trust subject where there are liens thereon; and to hold that he is, or that if he fails to do so an injunction will be awarded at the instance of any party in interest as of course, would be to impose serious delays, involving costs and expense, in the execution of deeds of trust, which the law never contemplated, and without promoting the interests of either creditor or debtor. It is only when the aid of a court of equity is necessary that it ought to be applied for; and it is only in such a case that its aid will be extended. If there are no real impediments in the way of a fair execution of the trust, then its aid is not necessary, and the costs of a lawsuit ought not to be added to the ordinary cost of executing the trust.

According to these principles, there was no necessity for the trustee in the present case to resort to a court of equity, and consequently there was no error in denying the prayer of the appellant for an account to be taken. Such an account was not necessary. The record shows that there was no cloud resting on the title, or doubt or uncertainty as to the debts binding the trust estate, or conflict among the creditors, or any other impediment whatever to the execution of the trust *in pais*. On the contrary, it shows that the exact amount of all the debts and their respective privities were fully known, and

that there was no dispute upon any of these points. These facts appear from the answers of the defendants, which are sworn to, and which, upon the motion to dissolve the injunction, must be taken as true, there being no evidence to the contrary: *Hogan v. Duke*, 20 Gratt. 244; 1 Bart. Ch. Pr. 414.

What reason, then, was there for an account of liens? Or what reason was there for apprehending a sacrifice of the property, if sold without an account being taken? None whatever. There is not even a suggestion in the record that there are any other liens on the land than those mentioned in the answers, and as to those, we repeat, there is no conflict or dispute.

The charge of bias and partiality on the part of the trustee is denied in the answers, and is not supported by any evidence in the case; and as the sale is to be made under the supervision of the court, nothing more upon that point need be said.

The point made in the court below, and renewed in the petition for appeal, that a trustee ought not to sell more land than is necessary for the purposes of the trust, is met by the terms of the decree, which directs the trustee to sell the land, or so much thereof as may be necessary, to pay the debt due to the appellee, Stone. How much it will be necessary to sell, is a question for the trustee to determine; and the presumption is, that he will determine it correctly and act accordingly: *Michie v. Jeffries*, 21 Gratt. 334; *Cleaver v. Mathews*, 83 Va. 801; 1 Bart. Ch. Pr. 446.

The decrees are affirmed.

TRUSTS AND TRUSTEES. — A trustee in a deed of trust is the agent of both parties, and is bound to act impartially between them; he is bound to sell for the best interest of his *cestui que trust*, and must use all reasonable diligence to obtain the best price for the land: *Livey v. Winton*, 30 W. Va. 555.

WHERE THE OMISSION OF SEALS TO A DEED OF TRUST raises a cloud over the title to land, the same should be rectified before a sale is made, under the deed of trust, to secure the purchase-money: *Bryan v. Stump*, 8 Gratt. 241; 56 Am. Dec. 140.

MURRELL v. DIGGS.

[84 VIRGINIA, 900.]

THE CERTIFICATE OF THE ACKNOWLEDGMENT OF A DEED CANNOT BE CONTRADICTIONED in an action of ejectment. The act of the officer in taking such acknowledgment is judicial in its character, and therefore cannot be impeached collaterally.

EJECTMENT. Judgment for the plaintiff.

W. W. Larkin, for the plaintiff in error.

John H. Lewis, for the defendant in error.

LEWIS, P. The plaintiff, defendant in error here, claimed title under a deed from John H. Lewis, trustee, dated December 15, 1886. The plaintiff purchased the premises in controversy at a public sale thereof made by the said Lewis, trustee, under a certain deed of trust dated November 18, 1881. The last-mentioned deed, which was introduced as evidence at the trial by the plaintiff, has annexed to it two certificates signed by A. G. Waugh, notary public, and in the form prescribed by the statute, certifying that on the said eighteenth day of November, 1881, the deed was acknowledged before him by Murrell (the defendant) and wife, "whose names are signed" thereto. And on the same day, the deed having been presented in the clerk's office of the corporation court of Lynchburg, in which city the premises in controversy are situate, was admitted to record "upon the annexed certificates of acknowledgment," as appears from the indorsement of the clerk on the deed.

The defendant pleaded the general issue, "not guilty," and at the trial offered to testify, as a witness in his own behalf, that at the sale of the premises by the trustee, he, the defendant, was present, and forbade the sale, on the ground that the deed of trust was a forgery; that it was never heard of by him before steps were taken to sell the property; that he never executed the deed, nor authorized its execution, and that of all this the plaintiff was informed on the day of sale, and before the sale took place. The circuit court, however, excluded the evidence, and the defendant excepted; and the question thus presented is the question to be determined.

It is conceded that the holder of the note secured by the deed of trust, and for whose benefit the sale was made, had no notice prior to the sale that the validity of the deed was questioned; nor was any attempt made to prove *mala fides*, either

on the part of the *cestui que trust*, or the trustee. The simple question then is, whether, upon the grounds just mentioned, parol evidence was admissible to contradict the deed of trust, which is regular on its face, and which purports to have been duly acknowledged and admitted to record. We are clearly of opinion that it was not. The act of an officer in taking an acknowledgment of a deed is judicial in its character, and cannot be impeached collaterally. He determines whether the person whose name is signed to the deed is the actual grantor, and also whether he truly acknowledges the same as his act and deed; and after these points have been determined and certified by him, in conformity with law, and the deed has been duly recorded, the proceeding has all the force and conclusiveness of a judgment of a court of record. The mischievous consequences of a different doctrine can hardly be overstated, inasmuch as it would render titles to real estate utterly insecure, and liable at any moment, and at any distance of time afterwards, to be questioned and overthrown by parol evidence in a collateral proceeding.

The question is not an open one in this court. In *Carper v. McDowell*, 5 Gratt. 212, it was said by Judge Baldwin, in delivering the opinion of the court, that "it may be laid down without qualification that the registration of a deed regular upon its face cannot be contradicted by evidence in any collateral controversy. Thus in an action of ejectment for the recovery of land, if the title turns upon the due registration of a deed, the registry itself is the only legitimate evidence upon the question, and parol evidence is inadmissible to prove that it was not duly proved or acknowledged and admitted to record, even though the registration was fraudulently procured." And in the same case it was said that, not only is a proceeding to register a deed which is regular on its face not impeachable collaterally by any evidence whatever, but that it cannot be impeached even directly, except in a court of equity, and not even there except upon the ground of fraud or upon some other ground which reaches the conscience of the party.

The same principle was asserted in *Harkins v. Forsyth*, 11 Leigh, 294, in which case it was decided that a certificate of two justices of the peace of the privy examination of a married woman could not be contradicted by parol evidence, there being no allegation of fraud. The privy examination of a married woman, it was said, is, in Virginia, a substitute for the

ancient common-law proceeding by fine in a court of record, which derived its name from putting an end, not only to the suit, but to all controversies concerning the same subject-matter, and could be relieved against only for fraud in the court of chancery. See also *Hitz v. Jenks*, 123 U. S. 297; *Davis v. Beazley*, 75 Va. 491; *First National Bank v. Paul*, 75 Id. 594; 40 Am. Rep. 740.

In the light of these principles, it is very clear that the judgment complained of must be affirmed.

ACKNOWLEDGMENTS. — The acknowledgment of a deed is a judicial act, and the certificate thereof, in absence of fraud, is conclusive of the facts therein stated: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 522, and note 559. A certificate of the acknowledgment of a deed by a married woman may be impeached by proving that she never appeared before the officer at all, and therefore could not have acknowledged the deed to him, and this is true, even against an innocent purchaser; but if she did appear before the officer for the purpose of making the acknowledgment, and attempted to do as the law requires in such cases, the certificate is conclusive of the facts therein stated, as to innocent purchasers at least: *Pickens v. Knisely*, 20 W. Va. 1; 6 Am. St. Rep. 622, and note 643. In the absence of fraud, the certificate of a notary public as to the acknowledgment of a deed is conclusive of all the facts therein stated: *Burson v. Andes*, 83 Va. 445.

CRUMP v. COMMONWEALTH.

[84 VIRGINIA, 927.]

CONSPIRACY OR COMBINATION TO INJURE ONE IN HIS TRADE OR OCCUPATION is indictable.

A COMBINATION IS A CONSPIRACY IN LAW, when the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or mischief.

CONSPIRACY. — PURPOSE SUFFICIENT TO SUSTAIN INDICTMENT for conspiracy may be some object of the confederates which it would be unlawful for them to attain singly, or which, if lawful singly, it would be dangerous to the public to permit to be attained by a combination of individuals.

CONSPIRACY — BOYCOTTING. — If two or more persons conspire by their intimidations or molestation to deter or influence another in the way he should employ his industry, his talents, or his capital, they are guilty of a criminal offense.

BOYCOTTING. — AN INSTRUCTION GIVEN ON A TRIAL OF PERSONS INDICTED FOR CONSPIRACY, that if the defendant entered into an agreement with one or more of his co-defendants whereby they undertook to coerce a business firm to discharge from their employment, against their will, certain persons then in their employment, and to take into their employment certain other persons that said firm did not wish to take in their

employment, then that said agreement was unlawful; and if the jury believed further that, to carry out said agreement, the defendant threatened any of the customers of said firm that the persons making said agreement would injure the business of such customers, and make them afraid to continue their patronage, then they should find the defendant guilty, — is not erroneous.

BOYCOTTING. — A CONVICTION FOR BOYCOTTING IS SUSTAINED BY THE EVIDENCE, when it appears from such evidence that the defendant and other members of a typographical union conspired to compel a firm of printers to make their office a "union office," and to compel them not to employ any printer not belonging to such union, and that upon the refusal of such firm, the defendant and others conspired and determined to boycott the firm, and send circulars to many of its customers notifying them that such firm was boycotted, and notifying such customers that the names of all persons who should continue to patronize the firm would be published in a black-list, and that the persons whose names were so published would in turn be boycotted until they agreed to withdraw their patronage from such firm of printers.

INDICTMENT for a criminal conspiracy to boycott the firm of Baughman Brothers. Verdict of guilty. The defendant asked for the following instructions, which were refused: "1. The court instructs the jury that if they believe, from the evidence, that the Typographical Union, No. 90, was, at the time of the alleged conspiracy, and had been for eighteen or twenty years previous, an association of printers formed for the purposes set forth in the preamble of their constitution, and that they authorized the defendants, Crump, Wilde, and Shelton, to try to get the printing-offices in the city to agree to employ only persons who were then or should afterwards become members of said union, and in case of failing to get any one of said offices to so agree, to notify said office that the said union would thereafter refuse to deal with said office, and would try to persuade their friends to so refuse also, and to refuse to deal with any one who should continue to deal thereafter with said office, and that the said Wilde, Shelton, and Crump attempted to persuade Baughman Brothers to so agree, but were refused by said Baughman Brothers, and afterwards notified their friends of such refusal and the patrons of said Baughman Brothers that the said union would not hereafter, until the trouble with said Baughman Brothers was settled, deal with said Baughman Brothers, or any person dealing with them, and would try to get all their friends to act likewise, and in said endeavor used no force, violence, threat, or personal intimidation against either Baughman Brothers or their patrons, then they must find the prisoner not guilty. 2. A person has a right to notify the public or

any number of persons of his intention to do a thing, if he has a lawful right to do the thing itself. Two or more persons have a right to notify the public that they have agreed to do a certain thing, if they have the right to agree to do the thing itself. 3. A person has the right to notify the public that he will not deal with a certain person, or any other person dealing with that person, unless the reason given be slander or libel. Two or more persons have the right to agree to notify the public that they will not deal with a certain person, or any other person dealing with that person, unless the reason given be slander or libel. 4. In law, a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act, and an intimidation is the act of making one timid or fearful of such declaration. But the announcement of an intention by several persons to do a thing which they have the right to do, either singly or together, cannot be a threat or an intimidation. And if the jury believe that the alleged conspirators confined themselves to merely announcing to the patrons of Baughman Brothers that they had stopped dealing with that firm, and would not deal with the patrons of said firm, and would get their friends to agree with them in their course, then the jury must find the prisoner not guilty. 5. If the jury believe, from the evidence, that the object of the alleged conspirators was to benefit and protect themselves in the pursuit of their calling or craft, and was not to injure Baughman Brothers, although such might be the result, and that they confined themselves to notifying the public that they would not deal with Baughman Brothers, or any one thereafter patronizing that firm, and would attempt to get their friends to assist them in that course, then the prisoner was not a party to an unlawful conspiracy, and he must be found not guilty."

Meredith and Cocke, for the plaintiff in error.

R. A. Ayers, attorney-general, for the commonwealth.

FAUNTLEROY, J. The plaintiff in error, W. F. Crump, was, on the twenty-eighth day of September, 1886, indicted for a criminal conspiracy, by a grand jury impaneled in the hustings court of the city of Richmond. The indictment was against the said Crump and others, — his co-conspirators, — and it contained two counts. A general demurrer was filed to the indictment and to each count thereof, which was sustained as to the second count; but was overruled as to the

first count, which charges that "there is, and for more than twelve months last past there has been, in the city of Richmond, a certain trades union or association, called and known as Richmond Typographical Union, No. 90; that there is in said city, and has been for more than twelve months last past, a mercantile firm or partnership composed of G. H. Baughman, E. A. Baughman, and C. C. Baughman, who do business under the firm name and style of Baughman Brothers, as printers and stationers; that there is in the said city, and has been for more than twelve months last past, another trades union or labor association, called the Knights of Labor; that the said partnership of Baughman Brothers have a lawful right to follow and pursue their said business as printers and stationers, without being molested or interfered with by any one, so long as they peaceably pursue the same according to the laws of the land; that the trades union or association called Richmond Typographical Union, No. 90, is composed of about one hundred members, most of whom are to the grand jurors unknown; that the said trades union or labor association called the Knights of Labor is composed of several thousand members, most of whom are to the grand jurors unknown; that Joseph M. Shelton, G. Waddy Wilde, and W. F. Crump are members of said trades union or association called Richmond Typographical Union, No. 90, and W. H. Mullen, James A. Healy, J. M. Lewis, Perry Jones, and J. H. Schonberger are members of said trades union or labor association called Knights of Labor; that within twelve months last past, to wit, on the fourth day of February, 1886, and on many days thereafter, the said G. Waddy Wilde, Joseph M. Shelton, and W. F. Crump, together with all the other members of said trades union or association called Richmond Typographical Union, No. 90, and W. H. Mullen, James A. Healy, J. M. Lewis, Perry Jones, and J. H. Schonberger, together with all the other members of the said trades union or labor association called the Knights of Labor, who are to the grand jurors unknown, with force and arms, at the said city, and within the jurisdiction of the said hustings court, well knowing the facts hereinbefore averred, did unlawfully, maliciously, wickedly, and corruptly, knowingly, and intentionally, combine, conspire, and confederate together to injure, ruin, break up, and destroy the said G. H. Baughman, E. A. Baughman, and C. C. Baughman, trading as Baughman Brothers, in their said business as printers and stationers as aforesaid, by unlawfully,

wickedly, maliciously, and corruptly, knowingly and intentionally, making threats to a great number of persons, to wit: To H. J. Myers, a member of a mercantile firm in said city, trading as Slater, Myers, & Co., which firm is composed of William L. Slater, Herman J. Myers, and John G. Wade; to William F. Seymore, a member of a mercantile firm in said city, trading as J. H. Griffith & Co., which firm is composed of J. H. Griffith and William F. Seymore; to Luke Harvey, a member of a mercantile firm in said city, trading as Ellison and Harvey, which firm is composed of William Ellison, Luke Harvey, and Frederick L. Swift; to G. A. Lathrop, a member of a mercantile firm in said city, trading as G. A. Lathrop & Co., which firm is composed of the said G. A. Lathrop; and to many other persons to the grand jurors unknown, all of whom had theretofore been regular customers of the said firm of Baughman Brothers,—that if they, the said H. J. Myers, W. F. Seymore, Luke Harvey, G. A. Lathrop, or their said mercantile firms as above named, or other persons to the grand jurors unknown, thereafter bought anything from the said firm of Baughman Brothers, or employed them, the said Baughman Brothers, in their said business as printers, they, the said Wilde, Shelton, Crump, and all the members of the said trades union or association called Richmond Typographical Union, No. 90, and they, the said Mullen, Jones, Lewis, Healy, and Schonberger, and all the other members of the said trades union or labor association called the Knights of Labor, would do all in their power to break up and destroy the business of the said H. J. Myers, W. F. Seymore, Luke Harvey, G. A. Lathrop, and their said mercantile firms as above named, and many other persons to the grand jurors unknown, who had theretofore been customers of the said Baughman Brothers, and by and through said threats, they, the said Crump, Wilde, Shelton, Mullen, Lewis, Healy, Jones, and Schonberger, and all the other members of the said trades union or association called Richmond Typographical Union, No. 90, and all the other members of the said trades union or labor association called the Knights of Labor, did, then and there, by reason of said threats, drive off, hinder, deter, and prevent the said H. J. Myers, W. F. Seymore, Luke Harvey, G. A. Lathrop, and their said mercantile firms as above named, and many other persons to the grand jurors unknown, who had theretofore been customers of the said Baughman Brothers, from buying anything from, or from dealing with in

any way, or from employing as printers, the said firm or partnership of G. H. Baughman, E. A. Baughman, and C. C. Baughman, doing business as Baughman Brothers as aforesaid; and they did, then and there, by their said unlawful, malicious, wicked, and corrupt threats, and by their said unlawful acts as hereinbefore set forth, do a serious injury to the business of the said Baughman Brothers, against the peace and dignity of the commonwealth of Virginia.”

The defendant, W. F. Crump, thereupon pleaded not guilty, and electing to be tried separately, he was so tried; and the jury, on the thirteenth day of May, 1887, found him guilty by their verdict, and fined him five dollars, which verdict the court, upon motion of the defendant, refused to set aside and grant a new trial, but approved the said verdict, and entered up the judgment here complained of.

Upon the trial, the defendant excepted to the rulings of the court giving the instruction asked for by the commonwealth, and refusing to give the instructions asked for by him; and he also excepted to the overruling by the court of his motion to set aside the verdict and grant to him a new trial.

The first error assigned is the action of the court in overruling the demurrer to the first count of the indictment. It is objected that the indictment does not charge a conspiracy to do any unlawful act, and does not particularly state the means to be used by the conspirators to break up and destroy the business of Baughman Brothers, and show that the means to be used were unlawful. The objection cannot be sustained,—it is wholly groundless and gratuitous, as is plainly manifest by the first count in the indictment (which we have purposely set out in full), to which the defendant pleaded, and upon which the issue was made up and tried, and under which the defendant was found guilty. It charges, directly, that the defendant and others “did unlawfully and maliciously, wickedly and corruptly, knowingly and intentionally, combine, conspire, and confederate together to injure, ruin, break up, and destroy Baughman Brothers in their business as printers and stationers”; and that they did this by unlawfully, wickedly, maliciously, knowingly, intentionally, and corruptly making threats to a great number of persons mentioned, and others unknown to the grand jurors, all of whom had been, and were at the time, regular customers and patrons of the said Baughman Brothers; and that they did, then and there, by their said unlawful, malicious, wicked, and corrupt threats, and by

their said unlawful acts, as hereinbefore set forth, do a serious injury to the business of the said Baughman Brothers, and a still greater injury to the peace, dignity, and good name of the commonwealth of Virginia,—to the evil example of all her people.

This specially and exactly charges a criminal conspiracy, unprovoked, wanton, and unlawful, both as to the end aimed at and the means used to accomplish it. It charges a combination of this defendant and his co-conspirators to ruin, break up, and destroy the business of Baughman Brothers, and it charges the means used, and the success of the unlawful endeavor operated upon the peaceful and honest industries of the customers and patrons of Baughman Brothers.

A conspiracy or combination to injure a person in his trade or occupation is indictable. In the case of *Rex v. Eccles*, 1 Leach, 274, several persons were indicted for conspiring to impoverish a tailor, and to prevent him, by indirect means, from carrying on his trade. They were convicted, and upon a motion in arrest of judgment, it was objected (as in this case) that the indictment ought to have stated the acts that were committed to impoverish the tailor and prevent him from carrying on his trade, in order that the defendants might thereby have had notice of the particular charges they were called upon to answer. But Lord Mansfield, without hearing the prosecution, said: "The conspiracy and object of it are both stated in the indictment, but it is contended that the means by which the intended mischief was affected ought also to have been particularly set forth, as in the case of *Rex v. Sterling*; but this is certainly not necessary, for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense." Buller, J., said: "The indictment states 'that the defendants, intending unlawfully and by indirect means to impoverish the prosecutor, unlawfully did conspire,' etc.; but nothing need to have been stated about the means, for the means are matter of evidence to prove the charge, and not the crime itself. The indictment, therefore, rather states too much than too little." This case was under consideration in the recent case of *Mogul Steamship Co. v. McGregor, Gow, & Co.*, 15 Q. B. Div. 476, decided in 1885, when Lord Coleridge, C. J., said of the case: "It seems to both of us to be within the principle of an old

case decided by Lord Mansfield (*Rex v. Eccles*, 1 Leach, 200, 274, 276), and so far as I know, the case itself is as good law now as when Lord Mansfield enunciated it, and could be upheld at the present day. It seems to me, also, to be within the principle neatly stated by Tindal, C. J., in *O'Connell v. The Queen*, 11 Clark & F. 234, as to what is evidence necessary to make out conspiracy; and also of the opinion of Lord Fitzgerald in the case of *Regina v. Parnell*. (The Times of January 25, 26, 1881.) If the judgment of the learned judge is correct,—and I do not mean to intimate the slightest doubt as to its correctness,—that a conspiracy to do the thing which has been called by the name of ‘boycotting’ is unlawful, and an indictable offense, and if so, then a thing for which an action will lie, an action may well lie for that which is complained of here. . . . A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief”: 3 Wharton’s Crim. Law, 6th ed., sec. 2322. In section 2304 of same writer, it is said the unlawful purpose may be “some object of the confederation which it would be unlawful for them to attain, either singly, or which, if lawful singly, it would be dangerous to the public to be attained by the combination of individual means”: See 3 Greenl. Ev., sec. 90. In the case of *Regina v. Druitt*, 10 Cox C. C. 592, Baron Bramwell said: “The liberty of a man’s mind and will to say how he should bestow himself and his means, his talents, and his industry was as much a subject of the law’s protection as was that of his body”; and “if any set of men agree among themselves to coerce that liberty of mind and thought by combination and restraint, they would be guilty of a criminal offense, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they conducted themselves. He was referring to coercion and compulsion,—something that was unpleasant and annoying to the mind operated upon; and he laid it down as clear and undoubted law, that if two or more persons agreed that they would, by such means, co-operate together against that liberty, they would be guilty of an indictable offense. The public had an interest in the way in which a person disposes of his industry and his capital; and if two or more persons conspired, by threats, intimidation, or molestation, to deter or influence him

in the way he should employ his industry, his talents, or his capital, they would be guilty of a criminal offense. This was the common law of the land," etc.

In the case of *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, it was held to be an "indictable conspiracy for several employees to combine and notify their employer that, unless he discharges certain enumerated persons, they will in a body quit his employment." In his opinion in that case, Chief Justice Beasley said: "There are a number of cases in which neither the purpose intended to be accomplished, nor the means designed to be used, were criminal, which have been regarded to be criminal"; quoting *State v. Norton*, 23 N. J. L. 44; and citing *Rex v. Lord Gray*, 3 Hargrave's State Trials, 519; *Rex v. Sir Francis Delaval*, 3 Burr. 1434. He says: "These are all cases, it will be noticed, in which the act which formed the foundation of the indictment would not in law have constituted a crime, if such act had been done by an individual; the combination being alone the quality of the transaction which made them respectively indictable. . . . The purpose designed to be accomplished becomes punitive, as a public offense, solely from the fact of the existence of a confederacy to effect such offense. . . . The doctrine of criminal conspiracy rests upon the obvious proposition that the power of many for mischief against the one is so great that the state should protect the one. Therefore the general principle, on which the crime of conspiracy is founded, is this: that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary were the same thing proposed or even attempted to be done by persons singly. . . . Now, that many acts, which, if done by an individual, are not indictable, are punished criminally when done in pursuance of a conspiracy among numbers, is too well settled to admit of controversy. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal": *State v. Rowley*, 12 Conn. 112, 113; *Regina v. Duffield*, 5 Cox C. C. 432; *State v. Crowley*, 41 Wis. 271; 22 Am. Rep. 719.

The next error assigned is the action of the court in giving the instruction asked for by the commonwealth, as follows: "If the jury believe, from the evidence, that the defendant

Crump entered into an agreement with one or more of the defendants, whereby they undertook to coerce the firm of Baughman Brothers to discharge from their employment, against the will of the said firm, certain persons then in their employment, and to take into their employment certain other persons that the said Baughman Brothers did not wish to take into their employment, then they are instructed that said agreement was unlawful; and if they believe further, from the evidence, that in pursuance and to carry out said agreement, he, the defendant, threatened any of the customers of the said Baughman Brothers, they (the said persons making said agreement) would injure the business of such customers, by intimidating their customers and making them afraid to continue their patronage of the customers of the said Baughman Brothers, then they must find the defendant guilty." The instruction plainly and correctly expounds the law against unlawful combination and guilty conspiracy to interfere with, molest, break up, and ruin the legitimate, licensed business of peaceable, useful, industrious, and honest citizens, and to accomplish this end by the threat and intimidation of doing "all in the power" of the conspirators to "break up and destroy the business" of all the existing or future customers of Baughman Brothers, who should thereafter buy "anything from the said firm of Baughman Brothers, or employed them, the said Baughman Brothers, in their said business as printers." And the instruction, so far from being a mere declaration of abstract law, is a direct and proper application of the law to the case put in the indictment and made by the evidence. It is next to impracticable to extend this opinion by reciting the evidence in detail, further than we shall do when we come to consider the error assigned upon the admissibility and sufficiency of the evidence in the record to justify the verdict.

The instructions which were asked for by the defendant and refused by the court were properly refused, as they did not correctly expound the law, and were unwarranted by the evidence. And, more than the defect of having no predication in the evidence, they utterly and adroitly ignore the facts proved of the evil intent of the defendant and his confederates to do a wanton, causeless injury and ruin, to compel and coerce Baughman Brothers to give up the control and conduct of their own long-established, useful, and independent business to the absolute dictation and control of a combination of

the defendant and others styling themselves "Richmond Typographical Union, No. 90"; and to do this by the obtrusion, terrorism, excommunication, and obloquy of the "boycott" against Baughman Brothers and all their customers in Richmond, Lynchburg, and throughout Virginia and North Carolina, *ad infinitum*, till they force the conquest and submission of all resistance to their demands and self-constituted management,—a reign of terror, which, if not checked and punished in the beginning by the law, will speedily and inevitably run into violence, anarchy, and mob tyranny. We come now to the main question involved in this appeal, whether the evidence set forth in this record presents a conspiracy at common law. The determination of this question is, indeed, the object sought, as we not only infer from the paltry fine of five dollars imposed by the verdict, but by the intimation in argument by the able and accomplished counsel for the defendant.

Is "boycotting," as resorted to and practiced by the conspirators in this case, allowable under the laws of Virginia?

For a legal definition or explanation of the meaning and practical effect of the cabalistic word, as well as for a pertinent exposition of the law applicable to the facts of this case, we refer to the admirable opinion of Judge Wellford of the circuit court of the city of Richmond, in the case of *Baughman Brothers v. Askew*, Va. L. J., April, No. 196, and also to the decision of the supreme court of Connecticut in the case of *State v. Glidden*, 55 Conn. 76; 3 Am. St. Rep. 23. In that case the court says: "We may gather some idea of its [boycotting] real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority: 'Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark, in the wild and beautiful district of Connemara. In his capacity as agent he had served notice upon Lord Earne's tenants, and the tenantry suddenly retaliated, etc. His life appeared to be in danger; he had to claim police protection. . . . To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvest was brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army.'" The court proceeded to say: "If this is a correct picture, the thing we call a boycott originally signified violence, if not murder. . . . But, even here, if it means,

as some high in the confidence of the trades union assert, absolute ruin to the business of the person boycotted, unless he yields, then it is criminal." The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators.

In the case of *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, Chief Justice Beasley, in delivering the opinion of the court, said: "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, etc. If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business, in other respects, controlled. I cannot regard such a course of conduct as lawful."

Chief Justice Shaw, in the case of *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, said: "The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality through whatever disguises it may assume. It is said that neither threats nor intimidations were used; but no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing (which the jury are quite satisfied have taken place, from all the evidence in the case), without there being any express words used by which a man should show any violent threats towards another, or any express intimidation. . . . An intention to create alarm in the mind of a manufacturer, and so to force his assent to an alteration in the mode of carrying on his business, is a violation of law": *Regina v. Rowlands*, 5 Cox. C. C. 436, 462, 463; *Doolittle v. Schanbacher*, 20 Cent. L. J. 229.

Upon the trial of boycotters in New York, Judge Barrett said: "The men who walk up and down in front of a man's shop may be guilty of intimidation, though they never raise a finger or utter a word. Their attitude may, nevertheless, be that of menace. They may intimidate by their numbers, their pleadings, their methods, their circulars, and their devices."

It matters little what are the means adopted by combina-

tions formed to intimidate employers, or to coerce other journeymen, if the design or the effect of them is to interfere with the rights or to control the free action of others. No one has a right to be hedged in and protected from competition in business; but he has a right to be free from wanton, malicious, and insolent interference, disturbance, or annoyance. Every man has the right to work for whom he pleases, and for any price he can obtain; and he has the right to deal with and associate with whom he chooses; or to let severely alone, arbitrarily and contemptuously, if he will, anybody and everybody upon earth. But this freedom of uncontrolled and unchallenged self-will does not give or imply a right, either by himself or in combination with others, to disturb, injure, or obstruct another, either directly or indirectly, in his lawful business or occupation, or in his peace and security of life. Every attempt by force, threat, or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression; and any and every combination for such a purpose is an unlawful conspiracy. The law will protect the victim, and punish the movers of any such combination. In law, the offense is the combination for the purpose, and no overt act is necessary to constitute it: *State v. Wilson*, 30 Conn. 507; *State v. Donaldson*, *supra*; *Walker v. Cronin*, 107 Mass. 564; *Carew v. Rutherford*, 106 Id. 10-15; 8 Am. Rep. 287; *Master Stevedores' Association v. Walsh*, 2 Daly, 12; *Walsby v. Auley*, 3 L. T., N. S., 666; *Regina v. Duffield*, 5 Cox C. C. 432; *Parker v. Griswold*, 17 Conn. 302; 43 Am. Dec. 739; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. Cas. 551; *Gilbert v. Mickle*, 4 Sand. Ch. 357.

A wanton, unprovoked interference by a combination of many with the business of another, for the purpose of constraining that other to discharge faithful and long-tried servants, or to employ whom he does not wish or will to employ (an interference intended to produce, and likely to produce, annoyance and loss to that business) will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society.

The recent case of *State v. Glidden*, already referred to, decided by the supreme court of Connecticut, is both in principle and features identical with the case under review. The Carrington Publishing company had in their employ a num-

ber of printers known as "non-union men," or "rats." The Typographical Union, the Knights of Labor, the Trades' Council, the Cigar-makers' Union, and other affiliated secret organizations, waited upon the company and demanded that their office be made a "union office" within twenty-four hours. Upon the refusal of the company to make their office a "union office," a boycott was instituted against them, which, though not openly published as in this case, was fully proved. The court in its opinion said: "If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance, — whether law and justice will protect the business, or brute force, regardless of law, will control it; for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle, and for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more. . . . Confidence is the corner-stone of all business, — confidence that the government, through its courts, will be able to protect their rights; but if their rights [of business men] are such only as a secret, irresponsible organization is willing to give, where is that confidence which is essential to the prosperity of the country? . . . The end would be anarchy, pure and simple, and the subversion, not only of all business, but also of law and the government itself. They [defendants] had a right to request the Carrington Publishing Company to discharge its workmen and employ themselves, and to use all proper argument in support of their request, but they had no right to say, 'You shall do this, or we will ruin your business.' Much less had they a right to ruin its business. The fact that it is designed as a means to an end, and that end in itself considered is

a lawful one, does not divest the transaction of its criminality."

The defendant lays great stress upon the case of *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, as authority to sustain the legality of boycotting; but there is an obvious distinction between that case and that of this defendant. That was a club or combination of journeymen boot-makers simply to better their own condition, and it had no aim or means of aggression upon the business or rights of others; they simply had regulations for themselves, and did not combine or operate for a result mischievous, meddlesome, and oppressive towards others. But, even in that case, the court, after supposing the case of a combination for the ultimate and laudable object of reducing, by mere competition, the price of bread to themselves and their neighbors, said: "The legality of such an association will, therefore, depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair and honorable means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy." Force may be operated either physically or mechanically; or it may be coercion by fear, threat, or intimidation of loss, injury, obliquy, or suffering.

The evidence in this case shows that while Baughman Brothers were engaged in their lawful business as stationers and printers, the plaintiff in error and the other members of the Richmond Typographical Union, No. 90, conspired to compel Baughman Brothers to make their office a "union office," and to compel them not to employ any printer who did not belong to the said union; that upon the refusal of Baughman Brothers to make their office (or business) a "union office," the plaintiff in error and others composing the said Richmond Typographical Union, No. 90, conspired and determined to boycott the said firm of Baughman Brothers, as they had threatened to do, and sent circulars to a great many of the customers of the said firm informing them that they had, "with the aid of the Knights of Labor and all the trades organizations in this city [Richmond], boycotted the establishment of Messrs. Baughman Brothers," and formally notifying the said customers that the names of all persons who should persist in trading, patronizing, or dealing with Baughman Brothers, after being notified of the boycott, would be published weekly in the Labor Herald as a "black-list," who, in their turn, would be boycotted until they agreed to

withdraw their patronage from Baughman Brothers; and, accordingly, the employees of Baughman Brothers were mercilessly hounded by publication after publication, for months, in the Labor Herald (which was the boasted engine of the boycotting conspirators), whereby it was attempted to excite public feeling against them, and prevent them from obtaining even board and shelter; and the names of the customers and patrons of the said firm were published in the said sheet under the standing head of "black-list."

The length of this opinion will preclude the mention of even a tithe of these incendiary publications week after week for months; but not only Baughman Brothers and their employees and their customers, but the hotels, boarding-houses, public schools, railroads, and steamboats conducting the business travel and transportation of the city were listed and published under the obloquy and denunciation of the "black-list." One or two specimens will suffice: "Boycott Baughman Brothers and all who patronize them." "Watch out for Baughman Brothers' 'rats,' and find out where they board. It is dangerous for honest men to board in the same house with these creatures. They are so mean that the air becomes contaminated in which they breathe." "Boycott Baughman Brothers every day in the week." "Boycott Baughman Brothers, because they are enemies of honest labor." "Boycott Baughman Brothers' customers wherever you find them." "The Lynchburg boys will begin to play their hand on Messrs. Baughman's boycotted goods in a short time. The battle will not be fought in Richmond only, but in all Virginia and North Carolina will be raised the cry, 'Away with the goods of this tyrannical firm.'" "Let our friends remember it is the patronage of the Chesapeake and Ohio, Richmond, Fredericksburg, and Potomac, Richmond and Danville, and Richmond and Alleghany railroads that is keeping Baughman Brothers up." "We are sorry to see the Exchange Hotel on the black-list. There will be two thousand strangers in this city in October, none of whom will patronize a hotel or boarding-house whose name appears on that list." "The boycott on Baughman Brothers is working so good that a man cannot buy a single bristol-board from the 'rat' firm without having his name put upon the black-list." "The old 'rat' establishment is about to cave in. Let it fall with a crash that will be a warning to all enemies of labor in the future."

It was proved that the conspirators declared their set pur-

pose and persistent effort to "crush" Baughman Brothers; that the minions of the boycott committee dogged the firm in all their transactions, followed their delivery wagon, secured the names of their patrons, and used every means short of actual physical force to compel them to cease dealing with Baughman Brothers, thereby causing them to lose from one hundred and fifty to two hundred customers, and ten thousand dollars of net profit. The acts alleged and proved in this case are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom, individual and associated, is the boon and the boasted policy and peculium of our country; but it is liberty regulated by law; and the motto of the law is, *Sic utere tuo ut alienum non lædas*.

The plaintiff in error was properly convicted; and the judgment of the hustings court complained of is affirmed.

CONSPIRACY, DEFINITION OF, AND WHAT ACTS CONSTITUTE: See *Phillips v. State*, 26 Tex. App. 228; 8 Am. St. Rep. 471, and note 477; *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23, and note 39; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note 473-492; which cases embody and discuss generally the law as recently adjudicated upon boycotting and conspiracy.



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- lished is proved by other evidence admitted without objection and un rebutted. *St. Louis etc. R'y Co. v. Mackie*, 766.
2. **THE SUPREME COURT MUST DECIDE FOR ITSELF ALL QUESTIONS** of law and of fact. The facts must be gathered from the record by the court itself, and cannot be obtained through any other source, or by any other persons than the judges. *State ex rel. Hovey v. Noble*, 143.
 3. **BILL OF EXCEPTIONS. — PARTY WHO SEEKS REVERSAL OF JUDGMENT MUST BRING** to the appellate court a record affirmatively showing a material error, since, in the absence of such showing, the presumption is in favor of the regularity of the rulings of the trial court. If all the evidence is not incorporated in the bill of exceptions, some statement must be made showing that it was excluded because deemed intrinsically incompetent. *Mercer v. Corbin*, 76.
 4. **EVERY FACT NECESSARY TO RECOVERY WHICH COULD BE PROVED UNDER PLEADINGS** must be considered as proved by the court on an appeal, in the absence of a statement of facts. And where the record contains no statement of facts, the appellate court cannot look to the charge of the trial court to determine whether or not there has been any evidence upon a particular issue. *Besso v. Southworth*, 814.
 5. **IF PLAINTIFF IS ENTITLED TO RECOVER FOR INJURY TO HIS FEELINGS** under the allegations of his petition, which must be presumed to have been proved upon the trial, a charge by the trial court that such injury could be recovered as actual damages, even if erroneous, is immaterial. *Id.*
 6. **FAILURE TO GIVE STRICTLY CORRECT CHARGE TO JURY IS NOT GROUND FOR REVERSAL** of a judgment, where the court has already presented to the jury the law of the case, clearly and fully, upon all the points to which the refused charge relates. *Missouri Pacific R'y Co. v. McEllyea*, 749.

See ELECTIONS, 8; EVIDENCE, 3; PARTITION, 1, 5.

ARREST.

1. **WHEN AUTHORIZED. —** If officers, even though unknown as such to the common law, are expressly authorized by statute or municipal ordinance to conserve the peace, they have all the common-law authority of constables or peace-officers, and may, without warrant, apprehend and take into custody those who violate such law or ordinance in their presence. *Veneman v. Jones*, 100.
2. **ONE IS NOT LIABLE FOR AN ARREST BECAUSE HE DIRECTS THE ATTENTION OF THE OFFICER** to what he supposes to be a breach of the peace, and the officer, without any other direction, on his own responsibility, arrests the offender for what he supposes to be an offense committed in his presence. *Id.*
3. **PRIVATE PERSON IS LIABLE FOR ARREST AND FALSE IMPRISONMENT IF HE INDUCES AN OFFICER TO ARREST ANOTHER** without a warrant, and without an offense having been committed in view of the officer, unless he justifies by showing that his charge was well founded. *Id.*
4. **SEARCH-WARRANT. —** Under the law of Missouri, a search-warrant properly drawn cannot contain a clause of arrest. The function of such warrant is to cause a search to be made at a specified place for personal property stolen or embezzled, and to secure the production of the property, if found, before the magistrate. If the facts stated in the sworn application for it also constitute a charge of crime, the magistrate may issue a separate warrant of arrest, though in that event the insertion

of such order in the search-warrant would be a mere irregularity, not vitally affecting the legality of the process. *Boeger v. Langenberg*, 322.

ASSAULT.

1. SOMETHING MORE THAN MERE NEGLIGENT TOUCHING OF PLAINTIFF'S PERSON is necessary to constitute an assault and battery. But there may be an actionable assault and battery, although there is no actual or specific intent to commit that offense. *Mercer v. Corbin*, 76.
2. WRONGFUL INTENT INFERRED. — Act of person in riding his bicycle against a pedestrian upon a town sidewalk in such a rude and reckless manner as to show a disregard of consequences, is an actionable assault and battery, the intent being implied from the act. *Id.*

See ADULTERY.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. LAW BECOMES PART OF DEED OF ASSIGNMENT FOR BENEFIT OF CREDITORS when it is made, and will control the assignee in the management and distribution of the estate, even though some of the terms of the deed may be at variance with the law. *Moody v. Carroll*, 734.
2. OMISSION IN ASSIGNMENT FOR BENEFIT OF FIRM CREDITORS TO PROVIDE FOR CREDITORS OF INDIVIDUAL MEMBERS of the firm does not avoid the assignment. The individual creditors are included by the law, and can enforce their rights against the assignee without disturbing the assignment. *Id.*
3. PROVISION AUTHORIZING ASSIGNEE FOR BENEFIT OF CREDITORS TO SELL ON CREDIT does not invalidate the assignment. The creditors may compel the assignee to sell on credit or for cash, as the best interests of all concerned may demand. *Id.*
4. ASSIGNMENT FOR BENEFIT OF CREDITORS IS NOT VITIATED BY FRAUDULENT CONVEYANCE MADE BY ASSIGNOR in contemplation of the assignment or at the time it was made. Such conveyance may be set aside by the assignee or by a creditor. *Id.*
5. DIRECTION TO PAY COSTS AND EXPENSES BEFORE CREDITORS does not invalidate an assignment for the benefit of creditors; the law provides that these shall be first paid. *Id.*
6. DIRECTION TO PAY TO OTHER CREDITORS, PRO RATA, BALANCE remaining in the hands of the assignee after discharging the debts of the accepting creditors will not render the assignment void. The power thus attempted to be given to the assignee by the deed is void, but it will be his duty to execute the trust according to law, ignoring the illegal power conferred upon him. *Id.*
7. PROVISION REQUIRING ASSIGNEE TO RETURN TO ASSIGNOR RESIDUE OF ESTATE after the debts of every kind have been paid or satisfied does not invalidate an assignment for the benefit of creditors; such a provision merely requires the assignee to do what the law requires him to do. *Id.*
8. GARNISHMENT, ASSIGNEE FOR BENEFIT OF CREDITORS NOT SUBJECT TO. — No creditor can, by attachment or garnishment, take any part of an estate, held by an assignee for the benefit of creditors under a valid assignment, out of his hands, and apply it to the payment of his debt. But after the trust has been fully executed, if there be any excess, non-accepting creditors may have it applied by garnishment; and if garnishment proceedings have been commenced, they should be allowed to stand, so as to secure to the garnishor any precedent rights he may have. *Id.*

9. ASSIGNEE FOR BENEFIT OF CREDITORS CANNOT DIVEST HIMSELF OF HIS FIDUCIARY CHARACTER nor relieve himself of responsibility as assignee by abandoning the trust estate, nor by conveying it to another. *McIlhenny v. Todd*, 753.
10. STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF ASSIGNEE FOR BENEFIT OF CREDITORS until relieved, removed, or discharged by order of the proper court, as against a creditor of the assignor who has shown himself entitled to the benefits of the assignment. *Id.*
11. ASSIGNEE FOR BENEFIT OF CREDITORS MAY BE REMOVED BY DISTRICT COURT in the exercise of its general equity jurisdiction, upon the application of one or more of the creditors. And the right to make application for such removal is not in any way dependent upon the amount of the claim due to the creditor making the application. *Id.*
12. DISTRICT COURT HAS JURISDICTION OF SUIT TO COMPEL ASSIGNEE FOR BENEFIT OF CREDITORS TO ACCOUNT and to obtain a judgment establishing the extent of his liability to the trust estate, without regard to the amount claimed by the party instituting such suit. *Id.*
13. PLAINTIFF WILL BE PRESUMED, AS AGAINST GENERAL DEMURRER, TO HAVE FILED STATEMENT and affidavit required by the statute, where in his petition for the removal of an assignee for the benefit of creditors he alleges that he accepted under the assignment, and that the assignee had made payments on his claim. The assignee will not be presumed to have paid funds of a trust estate to one not entitled to receive them. *Id.*

See PARTNERSHIP, 1, 2.

ATTORNEY AND CLIENT.

See ESTOPPEL, 4, 5; NEW TRIAL, 2, 3.

BANKS AND BANKING.

1. RELATION BETWEEN A SAVINGS BANK AND A DEPOSITOR THEREIN is that of debtor and creditor. *Fowler v. Bowery Sav. Bank*, 479.
2. IF A BANK PAYS TO ONE PERSON MONEYS TO WHICH ANOTHER IS ENTITLED, the latter has two remedies: he may sue the bank as his debtor, disregarding the payment, or he may ratify the payment, and recover its amount from the person by whom it was received. *Id.*
3. CONCLUSIVE ELECTION OF REMEDIES. — If a bank pays to one person moneys belonging to another, and the latter sues the wrongful receiver in an action for money had and received for the amount paid, he thereby irrevocably ratifies the payment and discharges the bank from all further obligation to him. *Id.*
4. RELATION BETWEEN DEPOSITOR AND BANKER is merely that of debtor and creditor, where the deposit is not special. The money deposited in the ordinary course of business is at once blended with the general funds of and becomes the property of the bank, and the depositor has only a debt against the bank payable on demand, upon the presentation and surrender of a draft or order, commonly known as a "check," addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer. *Grissom v. Commercial Nat. Bank*, 669.
5. BANK HAS NO AUTHORITY TO PAY TO THIRD PARTY a note made payable at its place of business, simply because of the fact that the maker has funds on deposit in the bank sufficient for that purpose, in

the absence of any usage, course of dealing, or previous instructions from the maker to that effect. Distinctions between notes and checks pointed out. *Id.*

6. CUSTOM OR USAGE OF BANK, to be binding, must be general as to place, and not confined to any particular bank or banks. It must be certain and uniform, and be known to both parties, as they are presumed to contract with reference to it. *Id.*
7. ESTOPPEL OF BANK TO CLAIM SET-OFF AGAINST DEPOSIT. — If, without authority, a bank pays to a third person a note on which its depositor is accommodation indorser, it will not be permitted to rely upon such payment as a set-off against the depositor, where, by reason of its failure to give notice of the payment, the indorser has lost recourse over on the party primarily liable. *Id.*

See GIFTS, 1.

BAWDY-HOUSES.

See DAMAGES, 1, 2.

BICYCLES.

See ASSAULT, 2; CRIMINAL LAW, 4.

BILL OF EXCEPTIONS.

See APPEAL, 3.

BONDS.

1. APPLICATION OF PAYMENTS BY PUBLIC OFFICER IS BINDING ON HIS SURETIES, and they cannot escape liability for his failure to pay over money collected during the term for which they were sureties by showing that he wrongfully applied such moneys to the payment of deficiencies occurring during the preceding term. *Crown v. Commonwealth*, 839.
2. SURETIES ON AN OFFICIAL BOND are not released from liability by the failure of other officials to exact settlements of their principal at the times prescribed by law. *Id.*

BOYCOTTING.

1. AN INSTRUCTION GIVEN ON A TRIAL OF PERSONS INDICTED FOR CONSPIRACY, that if the defendant entered into an agreement with one or more of his co-defendants whereby they undertook to coerce a business firm to discharge from their employment, against their will, certain persons then in their employment, and to take into their employment certain other persons that said firm did not wish to take in their employment, then that said agreement was unlawful; and if the jury believed further that, to carry out said agreement, the defendant threatened any of the customers of said firm that the persons making said agreement would injure the business of such customers, and make them afraid to continue their patronage, then they should find the defendant guilty, — is not erroneous. *Crump v. Commonwealth*, 895.
2. A CONVICTION FOR BOYCOTTING IS SUSTAINED BY THE EVIDENCE, when it appears from such evidence that the defendant and other members of a typographical union conspired to compel a firm of printers to make their office a "union office," and to compel them not to employ any printer not belonging to such union, and that upon the refusal of such

firm, the defendant and others conspired and determined to boycott the firm, and send circulars to many of its customers notifying them that such firm was boycotted, and notifying such customers that the names of all persons who should continue to patronize the firm would be published in a black-list, and that the persons whose names were so published would in turn be boycotted until they agreed to withdraw their patronage from such firm of printers. *Id.*

See CONSPIRACY, 4.

CARRIERS.

1. PERSON SENT IN CHARGE OF LIVE-STOCK ON RAILWAY TRAIN IS EMPLOYEE OF OWNER of the stock, and not of the railway company, notwithstanding the fact that by an agreement indorsed on the contract under which the stock is carried he agrees that he is the employee of the company. The true relations of the parties cannot be changed by such a contract, which is but a subterfuge upon which to predicate the discharge of the company from liability for damages. *Missouri P. Ry Co. v. Ivy*, 758.
2. LIABILITY OF COMMON CARRIER CANNOT BE LIMITED UPON FALSE OR COUNTERFEITED RELATIONS in a case where it cannot be done in express terms and by a direct agreement. *Id.*
3. PERSON SENT IN CHARGE OF LIVE-STOCK ON RAILWAY TRAIN IS PASSENGER for hire. The consideration for his passage is to be found in the services he renders in caring for the stock, or in the charges made for shipping the stock. And the railway company owes him the same duties of care that it owes to any other passenger upon a freight train. *Id.*
4. COMMON CARRIER CANNOT ABSOLVE HIMSELF FROM OR LIMIT HIS LIABILITY FOR HIS OWN NEGLIGENCE or the negligence of his servants. *Id.*
5. RAILWAY COMPANY IS LIABLE FOR ITS OWN NEGLIGENCE, OR THAT OF ITS SERVANTS, resulting in personal injury to a person traveling in charge of live-stock on its train, and if such person be killed through such negligence, it will be liable to his wife, children, and father. *Id.*
6. PASSENGER ON RAILROAD TRAIN DOES NOT LOSE HIS CHARACTER AS SUCH BY ALIGHTING from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the termination of his journey. If he intends to return and continue his passage, he retains the right of being protected by the regulations which the company have provided for the safety of persons traveling on its cars and using its station-grounds; and if he is injured by the omission of the servants of the company to obey rules adopted for the protection of persons in his situation, it is liable for the injuries thus received. *Parsons v. New York Central etc. R. R. Co.*, 450.
7. RIGHT TO RECOVER FOR PERSONAL INJURY CAUSED BY NEGLIGENCE OF RAILROAD COMPANY is not impaired by the fact that the plaintiff was suffering from Bright's disease at the time he was injured. *Louisville, New Albany etc. Ry Co. v. Snyder*, 60.
8. WHERE PASSENGER IS IN PROPER PLACE IN CAR, and makes no exposure of his person to danger, there can be no question of contributory negligence. *Id.*
2. COMMON CARRIERS ARE BOUND TO USE the highest practicable degree of care to secure the safety of passengers, and any negligence on their part is actionable. *Id.*

10. **BURDEN OF OVERCOMING PRESUMPTION OF NEGLIGENCE ARISING** from evidence of the occurrence of an accident and injury to a passenger is upon the carrier. *Id.*
11. **DUTY OF CARRIER IS NOT DISCHARGED BY TRUSTING** to the reputation of the manufacturers and the external appearance of materials used in the construction and maintenance of its bridges. And the duty to test and inspect the materials does not end when they are put in place, but continues during their use. *Id.*
12. **RAILWAY PASSENGER WHO HAS PAID FIRST-CLASS FARE, BUT RECEIVED SECOND-CLASS TICKET, IS NOT BOUND TO PAY ADDITIONAL FARE** as a condition on which he will be permitted to recover damages naturally growing out of a violation of its contract by the company in compelling him to ride in a second-class car, when it has the means of complying with its contract, and knowingly refuses to do so. The company cannot, in such case, be heard to urge in defense of an action for the breach of its contract, either for the purpose of defeating the action or lessening the damages, that the party injured might have secured the performance of the contract, and thereby prevented or lessened the injury by paying an additional compensation to induce it to perform the duty which it had already been fully paid to perform. *St. Louis etc. R'y Co. v. Mackie*, 766.
13. **RAILWAY COMPANY IS BOUND TO PROTECT SECOND-CLASS PASSENGERS FROM NOXIOUS INFLUENCES** not necessarily nor ordinarily incident to such travel, but brought about by the wrongful acts of other passengers, which it might, by the exercise of due care, prevent. *Id.*
14. **RAILWAY COMPANY IS LIABLE IN DAMAGES TO PASSENGER** who, being entitled to passage in first-class cars, is by the conductor of the train expelled from a car of that class wrongfully and in a manner calculated to humiliate and distress him, and compelled to take passage in a car in which the discomforts are greater than in the car in which he was entitled to ride, and to suffer unnecessary annoyances. *Id.*
15. **MISDELIVERY — PARTIES.** — Agent who has contracted with a carrier to deliver goods consigned to him at a particular place, and who has no pecuniary interest in them except his lien for commissions, is a trustee in an express trust under section 3463 of the Revised Statutes of Missouri, 1879, and may maintain an action for their wrongful delivery, in his own name. *Wolfe v. Missouri Pac. R'y Co.*, 331.
16. **DELIVERY.** — Common carrier may sometimes deliver goods to the true owner instead of to him who gave them into its charge for carriage. Thus where the contract is to carry and deliver according to the shipper's orders, or to account for the goods, the carrier may show that they have been delivered to the real owner upon his demand. *Id.*
17. **DELIVERY.** — To justify delivery to the true owner, contrary to or without the shipper's orders, the carrier has the burden of proving the ownership and immediate right of possession in the person to whom such delivery is made. *Id.*
18. **DELIVERY.** — Where a carrier has contracted to carry goods to a particular point, and there deliver them subject to the shipper's order, he cannot lawfully deliver them to an intending purchaser without orders, when the shipper has not in fact parted with his right of possession, and if the carrier does so deliver them, it is without authority and at his own risk. *Id.*

19. **LIABILITY AS WAREHOUSEMAN.** — If the owner of goods shipped over a railroad permits them to remain at the depot of their destination for an unreasonable time, the liability of the railroad company as carrier is thereby terminated, and it becomes liable only as warehouseman. But if the owner then demands the goods, and is informed by the agent in charge of the depot that they have not yet arrived although they were at the time there, and afterward the depot and goods are destroyed by fire, the failure to deliver the goods on demand is such negligence as will render the company liable as warehouseman for their value. *Union Pac. R'y Co. v. Moyer*, 183.
20. **CONTRACT LIMITING LIABILITY — EVIDENCE.** — Where the shipper of goods is given a receipt therefor, containing on its back a contract limiting the liability of the carrier during transit, and the liability as common carrier when the goods should safely reach their destination, and the owner permits the goods to remain at their destination until the carrier becomes liable only as warehouseman, and the goods are afterward destroyed by fire, — in an action to recover their value, the receipt and contract are immaterial, and are properly excluded if offered in evidence. *Id.*

See NEGLIGENCE, 7-10; RAILWAYS, 4; TELEGRAPHS, 1; TELEPHONES, 2.

CITIZENSHIP.

WHERE WIDOW AND HER MINOR SON, both of foreign birth, come to the United States, and the mother marries a citizen of the latter country, both she and her minor son are made citizens by such marriage. *Gumm v. Perry*, 312.

See ELECTIONS, 6.

CONFLICT OF LAWS.

See MARRIAGE AND DIVORCE, 1-3.

CONSPIRACY.

1. **CONSPIRACY OR COMBINATION TO INJURE ONE IN HIS TRADE OR OCCUPATION** is indictable. *Crump v. Commonwealth*, 895.
2. **A COMBINATION IS A CONSPIRACY IN LAW**, when the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or mischief. *Id.*
3. **PURPOSE SUFFICIENT TO SUSTAIN INDICTMENT** for conspiracy may be some object of the confederates which it would be unlawful for them to attain singly, or which, if lawful singly, it would be dangerous to the public to permit to be attained by a combination of individuals. *Id.*
4. **BOYCOTTING.** — If two or more persons conspire by their intimidations or molestation to deter or influence another in the way he should employ his industry, his talents, or his capital, they are guilty of a criminal offense. *Id.*

See BOYCOTTING, 1, 2.

CONSTITUTIONAL LAW.

1. **POLICE POWER.** — **LAWS PROHIBITING THE ADULTERATION OF ARTICLES OF FOOD**, or preventing imposition or fraud in the sale of such articles, are valid exercises of the police power of the state. Of the necessity for such statutes the legislature is the sole judge. *State v. Campbell*, 419.

2. **STATUTES PROHIBITING SALE OF ADULTERATED MILK**, or milk to which water or any foreign substance has been added, or the sale as pure milk of any milk from which any cream has been removed, are constitutional and valid. *Id.*
3. **EVIDENCE.** — Statute may authorize an analysis to be made of milk which is claimed to be adulterated, and the result of such analysis to be given in evidence, though the milk analyzed may have been, in the mean time, destroyed. *Id.*
4. **LEGISLATURE MAY FIX AN ARBITRARY STANDARD**, and declare that all milk falling below that standard is impure or adulterated, and a person cannot escape, when prosecuted under such statute, by proving that the milk, as given by his cows, fell below such standard, though they were fed on proper food. *Id.*
5. **OBLIGATION OF CONTRACTS**, protected by federal and state constitutions, is not derived solely from the acts and stipulations of the parties independent of existing law, but has vitality, and subsists outside the stipulations expressed by the parties. *Phinney v. Phinney*, 266.
6. **OBLIGATION OF CONTRACTS.** — The laws existing at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction, and discharge, but also those in relation to its enforcement. *Id.*
7. **OBLIGATION OF CONTRACTS.** — A state may, to a certain extent, and within proper bounds, regulate a remedy; yet if by subsequent statute it so changes the nature and extent of existing remedies as to materially impair the rights and interests of a party to a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests, and is unconstitutional and void. *Id.*
8. **OBLIGATION OF CONTRACT.** — The constitutional prohibition against the impairment of a contract secures from attack, not merely the contract itself, but all the essential incidents which render it valuable, and enable its owner to enforce it. *Id.*
9. **STATUTE IMPAIRING THE OBLIGATION OF CONTRACTS.** — Chapter 129 of the Laws of Maine, 1877, provides that where a debtor has mortgaged real estate to secure performance of a collateral agreement other than the payment of money, and proceedings have been commenced to foreclose the mortgage, and the time of redemption has not expired, a creditor having attached the mortgagor's interest may file a bill in equity to ascertain if the conditions of the mortgage have been broken; and if they have, a decree may be entered enabling him, by fulfilling the requirements imposed by the court, to hold the property to satisfy his demand; and pending such proceedings, the right of redemption shall not expire by any attempted foreclosure, and is unconstitutional and void, as to existing mortgages, as impairing the obligation of the contract, and abrogating a right which the mortgagee had by statute when the mortgage was executed of a fixed and definite period for foreclosure of the equity of redemption. *Id.*
10. **NO FUNCTIONS CAN BE IMPOSED ON JUDGES NOT OF A JUDICIAL NATURE.** — The legislature cannot exact ministerial duties of the judges of the supreme court, nor add duties to those devolved on them by the constitution. *Ex parte Griffiths*, 107.
11. **STATUTE REQUIRING JUDGES OF THE SUPREME COURT TO PREPARE SYLLABI** of their decisions is unconstitutional and void. *Id.*

12. JUDICIAL OFFICES MUST BE EXERCISED IN PERSON. — A judge cannot delegate his authority to another; nor can the legislature or any other power delegate it for him. *State ex rel. Hovey v. Noble*, 143.
13. THE JUDICIAL POWER OF THE STATE IS VESTED IN COURTS, NOT IN OFFICERS; and judicial duties cannot be assigned to persons who do not constitute a court. *Id.*
14. A DEPUTY JUDGE IS A THING UNHEARD OF IN JURISPRUDENCE, and unknown to the constitution. *Id.*
15. LEGISLATURE CANNOT CONFER JUDICIAL POWER upon any person or tribunal, for all judicial power comes from the constitution, and is by it vested in courts and judges. *Id.*
16. STATUTE PROVIDING FOR THE APPOINTMENT OF COMMISSIONERS OF THE SUPREME COURT to assist that court in the performance of its duties, to hold office for the term of four years, and until their successors are elected and qualified, and to perform such work as the supreme court shall assign or appoint, but in no event to be binding or conclusive upon the supreme court, is unconstitutional, because it is an attempt to confer judicial functions upon such commissioners, when the entire judicial power of the state has, by the constitution, been vested in certain courts. *Id.*
17. THE COURTS POSSESS THE ENTIRE BODY OF THE INTRINSIC JUDICIAL POWER OF THE STATE, and the other departments are prohibited from assuming to exercise any part of that judicial power. *Id.*
18. THE POWERS OF THE THREE DEPARTMENTS OF GOVERNMENT are not merely equal, — they are exclusive in respect to the duties assigned to each, and each is absolutely independent of the other. *Id.*
19. NEITHER THE EXECUTIVE NOR THE LEGISLATURE CAN SELECT PERSONS TO ASSIST COURTS in the performance of their judicial duties. A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. *Id.*
20. THE POWER TO APPOINT THE MINISTERS AND THE ASSISTANTS OF THE JUDGES IS A JUDICIAL POWER, and was a judicial power when the present constitution was adopted. *Id.*
21. JUDICIAL POWER, WHAT IS. — Whenever a power is conferred upon a court of justice, to be exercised by it as a court in the manner and with the formalities used in its ordinary proceedings, the action of such court must be regarded as judicial, irrespective of the original nature of the power. *Id.*

CONTEMPT.

See WITNESSES, 2.

CONTRACTS.

1. VALIDITY AND OBLIGATION OF CONTRACT, and capacity of parties thereto, are to be determined by the *lex loci contractus*, unless there be something in the contract which is deemed hurtful to the good morals or injurious to the rights of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country. *Robinson v. Queen*, 690.
2. COMITY, OR RULES OF PRIVATE INTERNATIONAL LAW, only require the recognition and enforcement of the law of the place of contract, leaving the state called upon to enforce such law the use of its own forms and machinery, so far as they can be adapted to the end in view. *Id.*

3. **CONTRACT FOR SALE AND FUTURE DELIVERY OF COMMODITY WHICH SELLER DOES NOT OWN**, and which has at the time no actual existence, but which may be procured in the market at the proper time, is a valid contract, if it is the intention of the parties, or one of them, that the commodity shall actually be procured by the seller and delivered to the purchaser; and this is so, although money may have been deposited, as a margin, to secure performance of the contract, or as indemnity against loss in case of failure of either party to perform. *Sondheim v. Gilbert*, 23.
 4. **IF DELIVERY OF SUBJECT-MATTER OF CONTRACT IS NOT CONTEMPLATED**, and real intention of parties is merely to speculate on the rise or fall of the market, and adjust the accounts between them by paying or receiving the difference between the contract and current price, then the whole transaction is illegal, as against public policy. *Id.*
 5. **CONTRACT VALID BY LAW OF STATE WHERE MADE AND TO BE PERFORMED** is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced. *Id.*
 6. **CREDITOR IS NOT BOUND TO INVEST FURTHER TO SECURE HIMSELF** against loss from the breach of a contract, by which such loss is caused. *Western Union Tel. Co. v. Sheffield*, 790.
- See CONSTITUTIONAL LAW, 5-8; CORPORATIONS, 7-9; SPECIFIC PERFORMANCE, 1-3; USAGES.

CORPORATIONS.

1. **IT IS NOT ESSENTIAL TO EXISTENCE OF CORPORATION** that it should possess property, and its legal existence is not therefore necessarily terminated, although it may have conveyed all its property. *State v. Western Irrigating Canal Co.*, 166.
2. **DULY INCORPORATED IRRIGATING COMPANY, HAVING POWER UNDER ITS CHARTER** to construct and operate a canal for irrigation, water-works, and manufacturing purposes, may, with the assent of its stockholders, lawfully sell and convey to another irrigating company its right of way, canal, personal and real property, provided it is done in good faith, and not to delay or defraud creditors. *Id.*
3. **NATURAL PERSONS MAY DO WITH THEMSELVES AND THEIR PROPERTY** WHATEVER IS NOT FORBIDDEN, but artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being. *Pittsburgh etc. R'y Co. v. Lyon*, 517.
4. **AT COMMON LAW, EACH SHARE-HOLDER OF CORPORATION IS LIABLE** for the debts of the corporation only so far as he may have agreed to contribute to the capital stock. His liability is in his corporate capacity, and is deemed the primary source for the payment of the company's debts. *Jackson v. Meek*, 620.
5. **INDIVIDUAL LIABILITY OF STOCKHOLDER.** — Each stockholder upon becoming such in a corporation with an individual liability clause in its charter does so with the understanding that he will not be held to pay individually, until the corporate assets have been found to be insufficient. *Id.*
6. **UNDER TENNESSEE STATUTE, ACTS OF 1875, CHAPTER 142, SECTION 21,** STOCKHOLDERS IN CERTAIN CORPORATIONS ARE MADE INDIVIDUALLY LIABLE, in addition to the liability of the corporation, for the wages of servants and employees that may be earned in the company's service, and an employee does not by taking a note and obtaining judgment

- against the corporation for such wages, and by receiving *pro rata* on his claim out of the corporate assets, waive his rights against the individual share-holders. *Id.*
7. STOCKHOLDERS CANNOT BY TRANSFER OF THEIR STOCK RELIEVE THEMSELVES from their individual liability to servants or employees for wages previously earned in the service of the corporation. *Id.*
8. INVALID STIPULATION IN CONTRACT FOR SUBSCRIPTION TO STOCK. — A stipulation in a contract with a subscriber to the initiatory capital stock of a manufacturing corporation, organized under the general incorporation laws of the state, which provides that the subscriber shall receive, in addition to his stock shares, interest-bearing bonds to an equal amount, secured by mortgage upon the company's plant, is without consideration, and is absolutely void, both as against creditors and between the subscriber and the corporation; and the failure of the corporation to carry out such illegal stipulation does not release the subscriber from liability upon his subscription. *Morrow v. Nashville etc. Co.*, 658.
9. STIPULATION IN CONTRACT OF SUBSCRIPTION to organization or initiatory stock of corporation to issue bonds to the subscriber to the full amount of his subscription, secured by first mortgage on the company's plant, is not to be regarded as a condition precedent to liability upon the subscription, and is nothing more than an independent stipulation, for the breach of which the remedy would be in damages, in a case where the subscriber paid part of his subscription in cash, giving notes for the balance, to be paid upon call, and having become a director, after organization, without receiving his bonds, and especially as the mortgage to secure the bonds could only be obtained by payment of the fund subscribed. *Id.*
10. CONDITIONAL SUBSCRIPTIONS TO STOCK OF CORPORATIONS are contrary to sound public policy, by reason of their tendency to mislead and ensnare creditors, and they ought not therefore to be encouraged. *Id.*

COSTS.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 5; SURETYSHIP, 6.

CO-TENANCY.

CONTRIBUTION OF CO-TENANT FOR TAXES. — Where one co-tenant has paid the taxes assessed in one sum against the property belonging to all the co-tenants in order to prevent a forfeiture of his interest, and before the land was sold for the tax, the lien is thereby discharged, and equity will not create a new lien in favor of such co-tenant for reimbursement upon the interests of the other co-tenants. *Preston v. Wright*, 257.

See PARTITION, 2-4, 9.

COVENANTS.

1. COVENANT OF SEISIN AND FOR QUIET ENJOYMENT IS BROKEN IF THE LOT CONVEYED AND PART OF THE BUILDINGS THEREON ENCROACH ON A PUBLIC STREET, on account of which the grantee is obliged to pull down part of such buildings and repave the street, if the fact of such encroachment was not known to the grantee when the deed was made. *Trice v. Kayton*, 836.

2. COVENANT AGAINST ENCUMBRANCES IS BROKEN BY AN OUTSTANDING EASEMENT of any kind other than that of a public highway. *Huyck v. Andrews*, 432.
3. AN ENCUMBRANCE, WITHIN THE TERMS OF A COVENANT AGAINST ENCUMBRANCES, INCLUDES every right to or interest in the land to the diminution of the value of the land, but consistent with the passage of the fee for the land. *Id.*
4. BREACH OF A COVENANT AGAINST ENCUMBRANCES TAKES PLACE THE INSTANT the conveyance is made. *Id.*
5. COVENANTS IN A DEED PROTECT THE GRANTEE AGAINST EVERY ADVERSE RIGHT, interest, or dominion over the land, whether he had notice of such adverse interest or not. *Id.*
6. EVIDENCE. — In an action to recover for a breach of a covenant against encumbrances based upon the existence of an easement consisting of a right to maintain a dam, the defendant is not entitled to ask the owner of such dam what is the fair value of his dam in connection with his mill. *Id.*

See EASEMENTS, 2.

CRIMINAL LAW.

1. IT IS POLICY OF CRIMINAL LAW TO SO CHARGE OFFENSE that if the defendant is acquitted he can the more easily plead and show such acquittal, if again charged with the same offense. This practice does not leave it to conjecture alone to determine whether such charge be identical with some former one, on which an acquittal has been had, but it must be specific to be available. *State v. Segermond*, 169.
2. MALICE AND CRIMINAL INTENT MAY BE INFERRED from recklessness and wanton disregard of human life. *Mercer v. Corbin*, 76.
3. INDICTMENT. — Motion to quash an indictment, though filed with the consent of court, and after plea of not guilty entered, but not withdrawn, will not have the effect of withdrawing such plea. *State v. Reeves*, 349.
4. BICYCLE IS A VEHICLE WITHIN THE MEANING OF THE LAW, and its use upon a public sidewalk is unlawful under Indiana Revised Statutes of 1881, section 3361, which makes it unlawful for any person to ride or drive upon a town or village sidewalk, and the rider of the bicycle may be held liable for an injury to a foot-man, although no injury was intended. *Mercer v. Corbin*, 76.

See EXTRADITION, 1, 2.

DAMAGES.

1. PETITION IS SUFFICIENT, IN GENERAL WAY, TO APPRISE DEFENDANT OF NATURE OF CLAIM of the plaintiff, where it alleges that plaintiff has been damaged in an amount stated by the difficulty in renting his premises, and by depreciation in their value on account of the defendant's having rented a house in the vicinity thereof to lewd women as a place of public prostitution, and, in the absence of any special exception thereto, is sufficient to warrant an award of damages for a loss of rents. *Besso v. Southworth*, 814.
2. PETITION SHOWS CASE FOR EXEMPLARY DAMAGES where it alleges that the defendant was notified that the establishment complained of was a bawdy-house; that he was warned in writing not to permit it to be used

for such purposes; and that, subsequent to such notice, he made a pretended conveyance to the keeper of the house in order to shield himself from responsibility. *Id.*

3. DEATH OF CHILD BEFORE BIRTH AND GRIEF OCCASIONED THEREBY TO MOTHER ARE NOT ELEMENTS OF DAMAGE, in an action for personal injuries to a wife. But evidence that the child was still-born may be admitted, if that fact tends to show that her labor was thereby prolonged and her suffering so increased. *Western Union Tel. Co. v. Cooper*, 772.
4. HUSBAND CANNOT RECOVER DAMAGES FOR HIS ANXIETY AND SYMPATHY FOR SUFFERING OF WIFE in an action to recover for personal injuries to her. Only the person who suffers the injuries proximately resulting from the wrong done is entitled to compensation in such action. *Id.*
5. MEASURE OF— WHERE ONE HAS BEEN INJURED BY THE NEGLIGENCE OF ANOTHER, the jury, in estimating the damages, may take into consideration his physical and mental suffering arising from the injury, his medical expenses in getting his injuries healed, his loss of wages for the time he was prevented from working, and proper compensation for his being deprived by the injuries from following such calling or business as he could have otherwise followed. *Richmond etc. R'y Co. v. Norment*, 827.
6. MEASURE OF, IN TORTS COMMITTED through mistake, ignorance, or mere negligence, is compensation only; but in such as are committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely, but may, if the evidence justifies it, award vindictive or exemplary damages. *Pittsburgh etc. R'y Co. v. Lyon*, 517.
7. VERDICT WILL NOT BE SET ASIDE ON THE GROUND THAT THE DAMAGES AWARDED WERE EXCESSIVE, where the action is to recover compensation for the death of one who left a widow and a number of infant children, unless the amount of the verdict is such as to warrant the belief that the jury were influenced by prejudice or partiality, or misled by some mistaken view of the merits of the case. *Virginia Mid. R'y Co. v. White*, 874.

See APPEAL, 5; EXECUTION, 11; INJUNCTION, 1, 2; JURISDICTION, 1; NEGLIGENCE, 12; TELEGRAPHS, 10, 13-17; TRESPASS, 2; TROVER.

DEBTOR AND CREDITOR.

CREDITOR BY OBTAINING JUDGMENT acquires no estate in the debtor's land, but a deed made before such judgment, and recorded before sale thereunder, is notice to a purchaser thereat, and will defeat him. *Parks v. People's Bank*, 295.

See CONTRACTS, 6.

DEDICATION.

1. PUBLIC ALLEY IN CITY. — Simple fact of dedication to public of alley in city makes it a public way, and no further action is required on the part of the city to open it for the use of the public generally. *Osage City v. Larkin*, 186.
2. ALLEY IN CITY RETAINS ITS CHARACTER AS SUCH, although one person owns the land on both sides of it, and it is so obstructed by the roadbeds of a railroad as to be practically impassable for general travel. *Id.*

DEEDS.

1. **DEED BY INSANE HUSBAND, OF HOMESTEAD**, perfect in form, and executed by him and his wife, is voidable only, but not void; and if the wife seek to avoid it, she must pay back the consideration received thereunder. *Pearson v. Cox*, 740.
2. **WHERE COURT DECREES REPAYMENT OF CONSIDERATION RECEIVED UNDER DEED**, upon rescinding a conveyance, it should order a sale of the property, after a reasonable time, for the purpose of raising the money found to be due. *Id.*

See ACKNOWLEDGMENTS; EXECUTIONS, 3-6.

DEPOSITION.

COURT MAY ALLOW OFFICER WHO TOOK DEPOSITION TO SUPPLY OMISSION therein, where it is satisfied that the deposition has not been altered. *Millikin v. Smoot*, 813.

See EVIDENCE, 11.

DIVORCE.

See MARRIAGE AND DIVORCE; HUSBAND AND WIFE, 5.

DOMICILE.

See HUSBAND AND WIFE, 1.

DOWER.

FRAUDULENT DEED BY HUSBAND AND WIFE. — Where a conveyance by the husband in which the wife joins is set aside as fraudulent as to creditors, the wife's right of dower is revived, and it makes no difference that she contracted with her husband to relinquish her dower in the land granted in consideration of receiving the residue after the satisfaction of the debts mentioned in the deed, because the deed of the husband being void, there is no estate in the grantee upon which the relinquishment of dower can operate, and she is therefore restored to her former rights. *Bohannon v. Combs*, 328.

EASEMENTS.

1. **AN EASEMENT IS AN INTEREST IN LAND CREATED** by grant or agreement, expressed or implied, conferring a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or from the estate of another. *Huyck v. Andrews*, 432.
2. **VISIBLE AND NOTORIOUS EASEMENTS ARE NOT EXCEPTED FROM THE OPERATION** of a covenant against encumbrances. *Id.*

See COVENANTS, 5.

EJECTMENT.

See ESTOPPEL, 6; PARTITION, 6.

ELECTIONS.

1. **CONTEST — NOTICE**. — Where in an election contest the ground upon which it is based does not touch the qualifications of the voters, it is not necessary to set out their names in the notice of contest; but it is sufficient to state the grounds of contest under section 5528, Revised

Statutes of Missouri; and such notice need not state the facts which constitute ballots fraudulent, as section 5493 of such statutes furnishes an absolute rule of evidence in that regard. *Gumm v. Hubbard*, 312.

2. **FRAUDULENT BALLOT.** — Where the county court has ordered a stock law submitted to the electors at a general election, their votes for or against it, written upon the ballots cast, does not render such ballots fraudulent under section 5493, Revised Statutes of Missouri, whether such order of the court was valid or not. *Id.*
3. **EVIDENCE TO EXPLAIN BALLOTS.** — Effect should be given to the will of the electors, and circumstances surrounding an election may be given in evidence to explain ambiguities in the ballots. Therefore where, in an election contest, there were but two candidates for a county office, and their names are so unlike that there is no danger of confusion between them, while the voting population was largely German, the court is authorized to find that ballots cast for "J. D. Hubba," "J. D. Huba," "Huber," "J. D. Hub," and "D. Huber" should be counted for "J. D. Hubbard." *Id.*
4. **PRESUMPTION THAT BALLOT IS VALID.** — Where an election is held, and the ballots received and counted by duly appointed officers, it is presumed that such ballots are legal, and the burden of proof is upon the party who asserts their invalidity to show that they are illegal. *Id.*
5. **PRESUMPTION THAT BALLOT IS LEGAL.** — It is not sufficient proof of the invalidity of a vote to show that the person who cast it is of foreign birth, nor that he made declaration of his intention to become a citizen more than five years before the date of the election in question. The presumption that the ballot is legal is not overcome by such proof, without more. *Id.*
6. **CITIZEN — MINOR CHILD — NATURALIZATION OF PARENT.** — The minor children of aliens, though born out of the United States, if dwelling therein at the time of the naturalization of the parents, thereby become citizens by virtue thereof. *Id.*
7. **ILLEGAL BALLOT.** — A ballot cast by one of the judges of election after the polls have been closed is illegal. *Id.*
8. **PRACTICE.** — The appellate court will not determine disputed or doubtful questions of fact in contested election cases; and if the judgment of the lower court is in accord with correct principles of law, it will be affirmed. *Id.*

EMINENT DOMAIN.

1. **WHEN A RAILROAD COMPANY LOCATES ITS LINE OF ROAD** over the lands of private owners, it secures a right to enter upon and occupy the land covered by such location, and though actual entry cannot be made until the damages accruing to the owner shall be paid or secured, and though the parties cannot agree upon the amount of damages, still the owner cannot prevent the exercise of the right of eminent domain by the company. *Lafferty v. Schuylkill River R. R. Co.*, 587.
2. **COMPENSATION FOR GROWING CROPS.** — When a railroad company locates its line of road over the lands of a private owner, he may either abandon the land covered by the line as located, and proceed to have his damages assessed, or he may continue to occupy and cultivate until actual entry by the company, and if he plants crops after the location and before notice and bond given by the company, he is entitled to damages for their destruction as well as for injury done to the land. *Id.*

3. **TENANT'S RIGHT TO COMPENSATION FOR GROWING CROPS.** — When a railroad company has located its line of road upon the lands of a private owner, and the latter leases it with notice to the tenant of the location, the latter has the right to occupy and cultivate the land until actual entry, and is entitled to damages for the destruction of his growing crops planted before notice when his possession would be interfered with, but he cannot be heard to complain that the value of his term has been diminished. *Id.*

EQUITY.

See FRAUDULENT CONVEYANCES, 1; PARTITION, 2, 7, 8.

ESTOPPEL.

1. **TO CONSTITUTE ESTOPPEL IN PAIS,** there must be a false representation or concealment of known material facts made to a party ignorant of their truth or falsity, and made with intent that the latter party would act upon them, and he must have so acted upon them. *Blodgett v. Perry*, 307.
2. **IN PAIS.** — Mere silence or some act done where the means of knowledge are equally open to both parties does not create an estoppel *in pais*. *Id.*
3. **TO CREATE ESTOPPEL IN PAIS,** it must be certain; the misrepresentation must be plain, not doubtful, nor a matter of mere inference or opinion. *Id.*
4. **IN PAIS.** — Where a party acts under the advice of his counsel that a purchase under a second execution will be good, and that the sale to be made thereunder will bar and estop another from asserting title under any former deed to the latter, the latter is not estopped from setting up title. *Id.*
5. **AN ATTORNEY'S NAME** signed to a petition merely as accommodation to plaintiff's attorney is not an estoppel as to the former from setting up title to land sold under execution issued in such suit. *Id.*
6. **EQUITABLE.** — Stranger to title cannot invoke an equitable estoppel against plaintiff in ejectment. *Id.*
7. **ESTOPPEL IN PAIS IS FOUNDED ON THE PROPOSITION** that a person *sui juris* has, by misrepresenting the truth, purposely induced another to believe in and act upon the existence of certain facts, which, if they were now made to appear different from what they were represented to be, would cause substantial injury to the person who acted on the faith of the representation. *Cook v. Walling*, 17.

See BANKS AND BANKING, 7; JUDGMENTS, 9; MARRIED WOMEN, 1, 2, 4-6; MUNICIPAL CORPORATIONS, 12.

EVIDENCE.

1. **INSPECTION OF BOOKS.** — Where evidence is the result of voluminous facts, or the inspection of many books and papers, the examination of which cannot conveniently take place in court, or where the witness has inspected the accounts of the parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay. *Masonic Mut. Ben. Soc. v. Lackland*, 298.
2. **GENERAL OBJECTION** to the competency of an exhibit or tabulated statement which is the result of an examination made by an accountant,

- and from which he testifies as a memorandum, is worthless, because not specific. *Id.*
3. **ERROR IN ADMITTING EVIDENCE** against objection is cured by admitting the same evidence subsequently without objection. *Id.*
 4. **IF EVIDENCE IS COMPETENT FOR ANY PURPOSE**, an objection to it cannot be regarded as well taken, although counsel who sought to introduce it claimed it to be admissible on an erroneous ground. *Parsons v. New York Central etc. R. R. Co.*, 450.
 5. **IF IMPROPER EVIDENCE HAS BEEN ADMITTED WITHOUT OBJECTION**, the only remedy of the opposing party is to move to strike such evidence out. *Id.*
 6. **PLEADING — JUDICIAL NOTICE.** — For some purposes, courts of one state may take judicial notice of the judicial decisions of other states, but as matter of law or fact, applicable to a particular case, the law of another state, whether declared by judicial decisions or otherwise, must be pleaded or proved, and will not be judicially noticed. *Cincinnati etc. R. R. Co. v. McMullen*, 67.
 7. **DECLARATION, TO BE PART OF THE RES GESTÆ**, need not be coincident in point of time with the main fact to be proved. It is sufficient if the two are so nearly connected that the declaration can, in the ordinary course of events, be said to be the spontaneous exclamation of the real cause, or if a subsequent declaration and the main fact at issue, taken together, form a continuous transaction, the declaration is admissible; but a mere subsequent declaration is not of itself a sufficient connecting circumstance to make it admissible. *Leahy v. Cass Ave. etc. R'y Co.*, 300.
 8. **DECLARATIONS OF PARTY INJURED BY RAILWAY TRAIN** as to how he received the injury, made when he was first picked up at the scene of the accident, surrounded by parties who witnessed it, are admissible as part of the *res gestæ*, but his declarations made from five to twenty minutes afterwards, when he had been removed fifty or seventy-five feet and placed on a cot, are inadmissible. *Id.*
 9. **RES GESTÆ.** — In action for damages for injury caused by a railway, evidence that immediately after the accident a woman was heard to shout "Murder" is inadmissible as part of the *res gestæ*. *Id.*
 10. **RES GESTÆ, STATEMENTS NOT ADMISSIBLE AS PART OF, WHEN.** — Statements made by by-standers an hour or two after a railroad disaster as to the cause of and the circumstances attending the accident are not admissible in evidence as part of the *res gestæ*. *Missouri Pacific R'y Co. v. Ivy*, 758.
 11. **OBJECTION GOING TO MANNER AND FORM OF TAKING DEPOSITION MUST BE MADE BEFORE TRIAL**, and notice given to the opposite party; otherwise, the deposition cannot be excluded when offered in evidence on the trial. *Id.*
 12. **PHYSICIAN CALLED TO TESTIFY AS AN EXPERT MAY GIVE OPINION** as to the nature and extent of an injury sustained to the person, though based in part on statements made to him by the person injured descriptive of present pains or symptoms. *Louisville etc. R'y Co. v. Snyder*, 60.
 13. **PHYSICIAN SHOWN TO BE EXPERT MAY GIVE IN EVIDENCE HIS OPINION** as to whether a child would have been born alive if medical assistance had been obtained in time. *Western Union Tel. Co. v. Cooper*, 772.

See GIFTS, 2; TELEPHONES, 8.

EXECUTIONS.

1. **RETURN.** — Under the Missouri Revised Statutes of 1879, section 2338, an execution may issue returnable at the option of the plaintiff, either to the first or second term of court after such issuance. *Blodgett v. Perry*, 307.
2. **PRESUMPTION IN FAVOR OF OFFICER.** — In the absence of proof to the contrary, it will be presumed that the clerk who issued and the sheriff who sold under the execution obeyed the dictates of duty, and complied with the law. *Id.*
3. **SALE — DEED.** — An assignee of a purchaser of land at sheriff's sale without taking a deed cannot, after fifteen years have elapsed, begin suit against such ex-sheriff to compel him to execute to him a deed, without notice to a party also claiming title, and a deed so executed is void as to the latter. *Id.*
4. **SHERIFF'S DEED.** — No title passes at sheriff's sale of land, except upon delivery of a deed. *Id.*
5. **SALE — DEED.** — Where a party, since deceased, purchased land at sheriff's sale, but took no deed, he has no interest that can be made the subject of administrator's sale. *Id.*
6. **SALE.** — Purchaser at sheriff's sale who allows fourteen years to elapse without taking a deed will be presumed, with those claiming under him, to have abandoned all claim to the premises. *Id.*
7. **SALE — NOTICE TO DEBTOR.** — Where the debtor's residence is described in the execution and other proceedings for the sale of his land, and the officer's return shows that he gave notice "to the judgment debtor in this execution" by mail, postage paid, he not being a resident of his county, it will be inferred that notice was given by mail directed to the debtor's residence, as stated in the execution, and as required by statute. *Millet v. Blake*, 275.
8. **SALE — SUFFICIENCY OF RETURN.** — Where the return of the officer states that he took and sold "all the right, title, and interest" of the judgment debtor in and to the land described, such return is sufficient to pass all the right, title, and interest of the debtor. This under chapter 76, section 42, Revised Statutes of Maine. *Id.*
9. **CONTINGENT INTEREST UNDER WILL.** — Where a testator by will provided for the distribution of the income of his estate, and then that "either at the death of the last survivor of my now living children or grandchildren who may be living at the time of my death, or at the expiration of twenty-one years from my own death, whichever event shall first happen," the principal of the estate shall vest absolutely in those entitled to the income. Until one of the events mentioned happens it is not determined who will be entitled to any part of the principal of the estate, and until then the interest of a legatee therein is contingent, and not subject to an execution attachment. *Patterson v. Caldwell*, 598.
10. **EXPECTANCIES AND CONTINGENCIES** are not subject to assignment or execution attachment at law, and while equity will uphold assignments of contingent interests or expectancies and things resting in mere possibility, if fairly made, and not against public policy, yet only a thing which has a present and certain existence, although its possession and enjoyment may be postponed for a time, is subject to execution attachment. The latter cannot be levied upon expectancies or contingent interests. *Id.*

11. **EXEMPT PROPERTY — DAMAGES NOT RECOVERABLE FOR SEIZURE OF, WHEN.** — The plaintiff in a suit is not liable in damages for the seizure and sale, by the officer to whom the writ is delivered, of property exempt from execution, where there is no evidence to show that the plaintiff directed the levy or in any way participated in the seizure, or that he ever received the proceeds of the sale, or in any manner ratified the seizure under the writ. When he places a writ in the hands of an officer for service he is presumed to intend that no action shall be taken thereunder not authorized by its terms. *White v. Stribling*, 732.
12. **EXEMPTIONS — RIGHT TO CLAIM EXEMPTION BY BECOMING HOUSEHOLDER AFTER LEVY.** — Debtor who was unmarried when judgment was obtained against him, and whose property was levied upon under an execution issued on the judgment, and advertised for sale, has a right to claim the benefit of the exemption laws, if between the date of levy and the date fixed for sale he marries and becomes a *bona fide* householder, and he is entitled to enjoin the sale. *Robinson v. Hughes*, 45.
13. **PROCEEDS OF VOLUNTARY SALE OF HOMESTEAD ARE LIABLE TO EXECUTION.** *Mann v. Kelsey*, 800.
14. **MONEY IN HANDS OF SHERIFF BELONGING TO JUDGMENT DEBTOR** against whom he holds an execution may be applied by him to such execution, although it has been made by him on execution. *Id.*

See HOMESTEAD, 2; PARTITION, 11.

EXEMPTIONS.

EXEMPTION LAWS OF TENNESSEE WERE ENACTED for the protection of citizens of that state only, and non-residents cannot avail themselves of their benefit. *Prater v. Prater*, 623.

See EXECUTIONS, 11-14.

EXPECTANCIES.

See EXECUTIONS, 9, 10.

EXTRADITION.

1. **TRIAL OF PERSON EXTRADITED FOR ANOTHER AND DIFFERENT OFFENSE.** — Where one state procures the extradition from another state of an alleged fugitive from justice, to be prosecuted for some particular offense for which his extradition was obtained, he cannot be prosecuted in such state for another and different offense until after he has had a reasonable opportunity to return to the place from which he was extradited. *State v. Hall*, 200.
2. **IT IS CONSTITUTIONAL DUTY OF STATE**, in every case, to extradite a fugitive from justice upon a legal requisition from another sister state, and it can ask no questions upon the subject, nor impose any terms. *Id.*

FALSE IMPRISONMENT.

Neither malice nor want of probable cause need be proved to support an action of false imprisonment. Evidence tending to show that plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no authority to issue, is sufficient to sustain such action. *Boeger v. Langenberg*, 322.

See ARREST, 3; MALICIOUS PROSECUTION, 7.

FORGERY.

See PAYMENT, 2.

FRAUD.

REPRESENTATIONS ARE NOT FRAUDULENT when made for an honest purpose, and with fair reason for believing them to be true, although they may turn out to be untrue. *Lewark v. Carter*, 40.

See HUSBAND AND WIFE, 3, 4; INSURANCE, 10; SALES, 1-4; SURETYSHIP, 1.

FRAUDULENT CONVEYANCES.

1. ALLOWANCE WILL BE MADE TO FRAUDULENT GRANTEE IN A SUIT IN EQUITY to compel him to account for rents received before the conveyance to him was set aside, for moneys paid out by him for taxes, necessary repairs, interest on valid pre-existing liens, and, in some cases, for commissions paid by him for the collection of rents; but he is not entitled to any allowance for insurance effected in his name and for his benefit. If he has paid interest at the rate of seven per cent on mortgages long past due, on which only six per cent could have been demanded by the mortgagees, he is not entitled to credit for any more than the latter sum. *Loos v. Wilkinson*, 495.

2. THE RULES GOVERNING AN ACTION AGAINST A FRAUDULENT GRANTEE are different from those applicable to an action brought by him. In an action of the latter class, the court might leave him entangled in the toil which he had himself woven, the victim of his own fraudulent acts. But when he is a defendant, pursued for the purpose of an accounting, such accounting will be controlled by equitable principles, and he may be allowed as offsets expenditures necessarily made by him for the preservation of the property, or for the discharge of pre-existing liens thereon. *Id.*

See CORPORATIONS, 2; DOWER; HOMESTEAD, 5; HUSBAND AND WIFE, 9, 10; MORTGAGES, 4, 5.

GARNISHMENT.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 8; MUNICIPAL CORPORATIONS, 13, 14.

GIFTS.

1. GIFT BY DEPOSIT OF MONEY IN SAVINGS BANK. — Deposit of money in a bank by a father in the name of his daughter, with the intention that such deposit shall take effect as a gift to her, subject to his right to the income while he lived, and to his wife's right of taking such income for her life, if she survived him, is a valid gift of such moneys to the daughter if she, upon being informed of the deposit and its purpose, assents thereto, although the father retains the deposit-book during his life to enable him to draw the income. *Smith v. Ossipee etc. Sav. Bank*, 400.

2. EVIDENCE MUST CORRESPOND WITH ALLEGATIONS. — Evidence showing a written assignment of a note "for value received," and a direction to the bailor thereof to deliver it to defendant, will not support the plea of a gift. *Hall v. Knappenberger*, 337.

3. UNDUE INFLUENCE. — An alleged gift of a note for five thousand dollars by a man eighty years old troubled with Bright's disease, and most of the time in a somnolent state from the use of opiates, to his con-

fidential friend, agent, adviser, and business manager, is presumptively void, and the burden of proof is on the donee to show the absolute fairness and validity of the gift, and that it is free from the taint of undue influence. This rule is the same at law as in equity. *Id.*

4. **GIFT CAUSA MORTIS** of a savings-bank book from husband to wife to be valid must be accompanied by an actual delivery of the book from the donor to the donee, and such delivery must be made for the express purpose of consummating the gift. A previous and continuing possession by the donee is not sufficient. *Drew v. Hagerty*, 255.
5. **CAUSA MORTIS**. — Actual delivery is essential to distinguish a gift *causa mortis* from a legacy, and without which such gift can only be sustained as a nuncupative will. *Id.*

GROWING CROPS.

See EMINENT DOMAIN, 2, 3; MORTGAGES, 3, 5.

HIGHWAYS.

See NEGLIGENCE, 1-4.

HOMESTEAD.

1. **WHAT IS SUFFICIENT DESIGNATION OF**. — The head of a family by living on a tract of land of less than two hundred acres with his family, as his home, thereby sufficiently designates it as his homestead, although he may own another tract in another county. *Coates v. Caldwell*, 725.
2. **COTTON GROWN ON HOMESTEAD WHILE UNPICKED IS EXEMPT FROM EXECUTION**; but when it has been picked the exemption ceases. *Id.*
3. **PROTECTION OF HOMESTEAD EXEMPTION IS STILL RETAINED BY WIFE AND MINOR CHILDREN** of a man who has left the state and desires them to follow him, so long as they remain upon the homestead left by him. Upon the husband's leaving the state, the wife becomes the head of the family, and she cannot be prevented from remaining in the state and continuing the occupancy of the home, whatever may be the purposes or desires of the husband after leaving the state. *McDannell v. Ragdale*, 729.
4. **IS NOT ABANDONED BY DESIRE OF CLAIMANT TO SELL IT**, or by his desire for future abandonment thereof, so long as it is actually occupied by him. *Id.*
5. **SALE OF, CANNOT BE FRAUD ON CREDITOR OF CLAIMANT**, since such creditor has no interest therein which may be used in payment of his debts. *Id.*

See EXECUTIONS, 13; HUSBAND AND WIFE, 2.

HOMICIDE.

1. **MURDER**. — Indictment for murder which fails to charge that the homicidal act was done feloniously is defective, and the defect is not cured by alleging that the assault was made feloniously, nor by the concluding words of the indictment that defendant did "feloniously kill and murder," when the words "feloniously," etc., are not connected with the mortal stroke by the words "then and there." *State v. Herrell*, 289.
2. **MURDER — SELF-DEFENSE**. — Where a party brings on a difficulty with the purpose of wreaking his malice by slaying his adversary, or doing him some great bodily harm, and actuated by such felonious purpose he does the killing, he is guilty of murder, and not entitled to the defense of self-defense. *Id.*

3. **MURDER.** — Instruction to the effect that the quality of the homicidal act is the same whether it was perpetrated with or without felonious intent, provided the perpetrator "brought on the difficulty or voluntarily entered into the same," is erroneous. *Id.*
4. **MURDER.** — Instruction which in effect holds that an intentional killing which may only be murder in the second degree is murder in the first degree is erroneous. *Id.*
5. **MURDER — ADULTERY No DEFENSE.** — Where adulterous intercourse has taken place for a long series of years with the full knowledge of a son, who slays his mother's paramour in revenge, the adultery is no justification. *Id.*
6. **INVOLUNTARY MANSLAUGHTER** is where a man, doing an unlawful act not amounting to a felony, by accident kills another; or where one kills another while doing a lawful act in an unlawful manner. *State v. Dorsey*, 111.
7. **INVOLUNTARY MANSLAUGHTER.** — A RAILROAD ENGINEER WHO CARELESSLY AND NEGLIGENTLY runs his locomotive into a passenger-car standing upon the railroad track, and thereby causes the death of one of its passengers, is guilty of involuntary manslaughter. *Id.*

HUSBAND AND WIFE.

1. **DOMICILE.** — As a general rule, the domicile of the husband is, in contemplation of law, the domicile of the wife; but there are exceptions to the rule, as where the wife voluntarily absents herself, under circumstances amounting to a wrongful abandonment of the husband, and permanently resides in another state. *Prater v. Prater*, 623.
2. **HOMESTEAD — WIFE'S FORFEITURE OF RIGHT TO HOMESTEAD IN HUSBAND'S PROPERTY.** — A woman who, without cause, voluntarily and permanently deserts her husband and home, and elopes with another man, and lives with him in another state in continuous lewd intercourse for a long period of years, and until her deserted husband's death, forfeits all right, as widow, which she may ever have had to homestead in lands owned by the husband at his death. *Id.*
3. **ANTENUPTIAL SETTLEMENT** made by the intended husband on the wife without a full disclosure of the value of his property, and whereby the provision secured for the wife is grossly disproportionate to the means of the intended husband, raises a presumption of designed concealment, and casts upon him the burden of proof to show that it is fair. *Neely's Appeal*, 594.
4. **ANTENUPTIAL SETTLEMENT — FRAUD — DURESS.** — Where a widower of large means, aged sixty years, and the father of two sets of children, procures the signature of his intended wife, a spinster aged over fifty years, to an antenuptial settlement, in the presence of her nearest relatives, an uncle and two brothers, by the provisions of which he relinquishes all claim to twelve thousand dollars owned by her in her own right, and agrees to give her six hundred dollars per year after his death, in full of all her claims against his estate, she cannot after his death repudiate the settlement, on the grounds that she signed under duress, or that it was so disproportioned to his means as to create a presumption of fraud and intended concealment, especially after she has lived with him as his wife for ten years, and he has provided by will for the payment of the settlement, and left her his mansion-house so long as she wants to use it. *Id.*

5. CONVEYANCE TO HUSBAND AND WIFE VESTS IN THEM an estate by the entireties in which neither can convey any interest without the assent of the other, unless their marital relation has been severed by divorce. *Enyeart v. Kepler*, 94.
 6. CONVEYANCE BY HUSBAND TO WIFE OF LANDS OF WHICH THEY ARE TENANTS BY THE ENTIRETIES is valid, and divests him of all estate in the land, and converts her estate into an estate in fee and in severalty. Her assent to such conveyance is sufficiently manifested by its acceptance by her, and her subsequent disposition of the property by will. *Id.*
 7. AT COMMON LAW, UNDER CONVEYANCE OF REAL ESTATE TO HUSBAND AND WIFE, they do not take either as joint tenants or tenants in common, unless by express words, or words strongly implying such intention. Without such words, the estate conveyed is a tenancy in entirety, and on the death of one the survivor becomes sole seised of the entire state. And this rule of law as to the rights of the survivor has not been changed by the statutes relating to married women, nor by those relating to descents and distributions, nor by any other statutes. *Baker v. Stewart*, 213.
 8. HUSBAND IS PROPER PARTY TO SUE FOR PERSONAL INJURY TO HIS WIFE, and she is not a necessary party. *Western U. Tel. Co. v. Cooper*, 772.
 9. POST-NUPTIAL SETTLEMENT IS PRIMA FACIE FRAUDULENT AND VOID as against pre-existing creditors; and those claiming under it must, to rebut this presumption, prove that it was made for a valuable consideration in good faith, upon a contract coeval or nearly coeval with it. *Beecher v. Wilson*, 883.
 10. POST-NUPTIAL SETTLEMENT CANNOT BE SUPPORTED AS AGAINST PRE-EXISTING CREDITORS by showing that the husband received moneys of the wife and used them in his business, unless it be also proved that at the time of such reception the moneys were understood to be loaned, and that both husband and wife intended to stand to each other in the relation of debtor and creditor. *Id.*
 11. PRESUMPTION WHEN HUSBAND RECEIVES MONEY OF HIS WIFE, and uses it in his business, and in the purchase of property in his own name, is, that she intended to give, and not loan, it to him. *Id.*
- See DAMAGES, 4; DEEDS, 1; DOWER; GIFTS, 4; HOMESTEAD, 3; MARRIED WOMEN, 9, 10, 12, 13; TAXATION, 2.

IDEM SONANS.

See MORTGAGES, 1.

INFANTS.

See LIMITATIONS, 2; TRESPASS, 4.

INJUNCTION.

1. MEASURE OF DAMAGES FOR SUING OUT INJUNCTION to enjoin the sale of personal property seized in execution, where some of the property was subject to execution, is the value of the property which was subject to execution. *Coates v. Caldwell*, 725.
2. DEFENDANT IN INJUNCTION SUIT MAY, WITHOUT SERVING CITATION UPON SURETIES upon the injunction bond, upon proper pleadings and proof, recover his damages for the wrongful suing out of the writ of injunction. *Id.*

2. **WILL LIE TO RESTRAIN** an execution sale of land where the equitable title is in a purchaser from the judgment debtor by payment of the purchase price under contract of sale made prior to the judgment, and where a deed has been made and recorded prior to such sale. Such remedy exists even if the judgment creditor was ignorant of plaintiff's rights before judgment was entered, if the former has not been misled to his prejudice, and laches has not intervened, and it exists because an innocent purchaser at such sale would acquire the legal title. *Parks v. People's Bank*, 295.

See TRUSTS AND TRUSTEES, 1, 3, 4.

INSANE PERSONS.

See DEEDS, 1.

INSTRUCTIONS.

1. **INSTRUCTIONS TO JURY MAY PROPERLY BE REFUSED**, EVEN THOUGH CORRECT IN POINT OF LAW, when other instructions are given which cover the case, and properly submit it to the jury. *Virginia Midland R'y Co. v. White*, 874.
 2. **CHARGE TO JURY GIVEN ON HYPOTHESIS NOT JUSTIFIED BY EVIDENCE IS IMPROPER.** *Western Union Tel. Co. v. Cooper*, 772.
- See APPEAL, 5, 6; NEGLIGENCE, 13; RAILWAYS, 9.

INSURANCE.

1. **CONDITION OF INSURANCE POLICY INVOLVING A FORFEITURE** will be construed most favorably to the assured and most strongly against the insurer. *Mutual Assur. Soc. v. Scottish Union etc. Ins. Co.*, 819.
 2. **NOTICE BY THE INSURER FOR THE PURPOSE OF CANCELING A POLICY** cannot be given to nor served upon the mere broker or agent by whom it was obtained, though the policy declares that the person who procured it shall be deemed the agent of the insured. *Id.*
 3. **LOCAL USAGE THAT NOTICE OF CANCELLATION OF POLICY OF INSURANCE SHALL BE GIVEN TO THE BROKER** by whom it was obtained cannot be allowed to prevail, where the policy stipulates that notice shall be given to the assured. *Id.*
 4. **WORDS "VACANT AND UNOCCUPIED," WHEN USED IN A POLICY OF INSURANCE**, in connection with the idea that the insurer was stipulating against an increase in the risk, from the absence of persons from the premises insured, must be regarded as interchangeable, and equivalent in meaning. If no one lives in the house, it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove. *Moore v. Phoenix Ins. Co.*, 384.
 5. **FORFEITURE — NOTICE TO THE HOLDER OF A POLICY OF INSURANCE** stating that a certain premium, giving the amount, will fall due at a designated time and place; that the conditions of his policy are, that payment must be made on or before the date the premium is due; that members neglecting to pay are carrying their own risks; that agents have no right to waive forfeitures; and that prompt payment is necessary to keep his policy in force, — is not sufficient to work a forfeiture of a life insurance policy under the statutes of New York, which declare that "no life insurance company doing business in this state shall have
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power to declare forfeited or lapsed any policy thereafter issued by reason of non-payment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom it is payable, shall be duly addressed and mailed to the person whose life is assured, at his last known post-office address, postage paid by the company, and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void." *Phelan v. Northwestern L. Ins. Co.*, 441.

6. SUBROGATION. — REFUSAL OF PARTY INSURED IN FIRE POLICY to make an assignment to the insurers of a cause of action against a wrong-doer through whose negligent act a loss occurred is no defense to an action on the policy, in the absence of an express covenant by the insured to assign. *Insurance Co. of North America v. Fidelity and Trust Co.*, 546.
7. RELEASE BY INSURED OF CLAIM AGAINST WRONG-DOER WHOSE ACT CAUSED THE LOSS BY FIRE. — A party insured in a fire policy may settle with and release a gas company whose alleged negligent act caused the loss to the injured property from all claim for injuries not covered by the insurance, without prejudice to his right of recovery against the insurance company for the loss by fire. *Id.*
8. SUBROGATION. — It is good defense to action against insurance company brought on a policy of fire insurance which provides that when the company should claim that the fire was caused by the wrongful act or omission of another creating a cause of action, the party to whom the loss was payable under the policy should, on receiving payment, assign such cause of action to the company, if it be shown by the defendant that subrogation had been demanded, and that payment of the loss had been offered upon receiving an assignment of the cause of action against the wrong-doer whose negligence was alleged to have caused the loss; also, that the plaintiff had refused to make and deliver such assignment, and had, in disregard of the covenant in the policy, settled with such wrong-doer, giving a release from liability, such release not to affect, however, the claim of the plaintiff against the insurance company for loss. By the terms of the policy, the act of payment on the one hand, and of assignment on the other, are made concurrent, and the covenants being dependent, performance by one of the parties cannot be compelled without performance, or an offer to perform, by the other. *Niagara Fire Ins. Co. v. Fidelity etc. Trust Co.*, 543.
9. WAIVER OF BY-LAWS. — Where the by-laws and conditions of a mutual insurance company provide that all general or local agents shall be appointed by the secretary, and furnished with a certificate of appointment under seal setting forth their powers, and no insurance, whether original or continued, shall be considered binding, unless the premium shall have been actually paid to some duly authorized and commissioned agent, such by-laws and conditions are solely for the benefit of the insurer, and may be waived, and are waived, when he authorizes his agent to deliver a policy and receive the premium, though such agent has not been duly authorized and commissioned as provided in the by-laws. Such a course of dealing adopted between the insurer and his agent, though wholly inconsistent with the provisions of the policy, cannot be set up to defeat a recovery. *Susquehanna Mut. Fire Ins. Co. v. Elkins*, 608.

10. **FALSE REPRESENTATIONS REGARDING HEALTH IN POLICY.** — The insured was confined by childbirth in November, 1887; was sick of typhoid fever in January, 1888, from which she got up some time in March following. She applied for insurance March 1, 1888, was examined by the company April 18, 1888, and her application approved the 22d of the same month. On May 12, 1888, her physician found her weak, coughing, and sick with consumption, which caused her death on July 21, 1888. In her application she stated that she then was in good health, and that she had usually had good health, and in a suit to cancel the policy, the jury found she believed her statements to be true, but this court holds that such finding is not supported by the evidence, and orders the policy annulled. *Maine Ben. Ass'n v. Parks*, 240.
11. **WHAT IS GOOD HEALTH.** — The health of body required at the time of making application for insurance to make the policy attach is not perfect and absolute health, nor must it exclude all disorders or infirmities which may possibly shorten life. Only an ordinary and reasonable degree of health is required, and this question is generally to be determined by the jury. *Id.*

IRRIGATING COMPANIES.

See CORPORATIONS, 2.

JUDGMENTS.

1. **GENERAL PROPOSITION THAT DECREE OF PROBATE BY REGISTER OF WILLS IS JUDICIAL DECREE**, and after the lapse of five years unappealed from, is conclusive as to the real estate devised, must be understood as qualified by the same conditions that qualify the conclusiveness of judgments at law. *Wall v. Wall*, 549.
2. **WANT OF JURISDICTION**, either of person or subject-matter, appearing upon face of record, can be taken advantage of at any time and in any court where the conclusiveness of the judgment or decree is the subject of judicial inquiry. *Id.*
3. **JURISDICTION OF REGISTER OF WILLS IS CONFERRED BY STATUTE**, and within the limitations prescribed his decrees are conclusive, but outside of such limitations he is without authority to make a decree, and his decree, if made, is a nullity. *Id.*
4. **JURISDICTION.** — WHERE REGISTER OF WILLS HAS JURISDICTION, decree regular in form will be aided by the presumption that all things necessary to be done have been rightly done. But jurisdiction will not be presumed when the record shows the want of it. *Id.*
5. **PRONOUNCED BY A DISQUALIFIED OR INTERESTED JUDGE** is voidable only, not void. *Fowler v. Brooks*, 425.
6. **JUDGMENT WILL NOT BE DISTURBED** where there is abundant evidence to sustain it, though there may be some evidence to the contrary effect. *Bohannon v. Combs*, 328.
7. **AMENDMENT OF.** — The court may amend its record so as to make it conform to the truth, even after the term has expired or writ of error lodged; but the court has no power to make an alteration in the record which is not an amendment, and without support from the record, and when its effect is to deprive defendant of a new trial, the right to which by lapse of time had become absolute, and beyond the power of interference from the court below. *Creed v. McCafferty*, 578.

8. **IF A JUDGMENT IS REFORMED SO AS TO MAKE IT FOR A LESS SUM THAN THAT FOR WHICH IT WAS FIRST ENTERED**, the judgment creditor becomes liable to an action for the difference between the two amounts, if he has bid off land at a sheriff's sale under such judgment for the full amount for which it was originally entered, and, after its reformation, has taken out a deed, and thereby elected that the sale should stand as made. *Mitchell v. Weaver*, 104.
9. **DISTRICT COURTS HAVE AUTHORITY, IN CIVIL CASES, TO SET ASIDE ALL ORDERS, judgments, and decrees of the term; and the setting aside of such orders, judgments, and decrees cannot estop the parties thereto from again litigating the questions involved.** *Aycock v. Kimbrough*, 745.
10. **RES ADJUDICATA — JUDGMENT ON DEMURRER, WHEN FINAL.** — Where, to an action upon a judgment, a demurrer is interposed and sustained upon the ground that the court had no jurisdiction to render the judgment, and judgment is rendered upon the demurrer in favor of the defendant, such judgment goes to the merits of the action, and must be considered as complete and final as though the matter had been submitted to a jury, and a verdict and judgment had thereon. It not only precludes the bringing of another action upon the judgment demurred to, but also bars the interposition of that judgment as a defense to a new action upon a note, the subject of the judgment. *McLaughlin v. Doane*, 210.

See DEBTOR AND CREDITOR.

JUDICIAL SALES.

1. **Sale of personal property under execution passes only the right, title, and interest of the judgment debtor.** If he has no interest, none passes by the sale to the purchaser. *Lewark v. Carter*, 40.
2. **THERE IS NO WARRANTY IN EXECUTION SALES;** and if the sheriff sells personal property in good faith, he is not responsible to the purchaser for any defects in the title. *Id.*
3. **SHERIFF IS ONLY MINISTERIAL OFFICER,** and does not warrant anything in connection with the sale by him of property upon an execution lawfully in his hands. *Id.*
4. **REPRESENTATIONS MADE BY DEPUTY SHERIFF AT SALE OF PERSONAL PROPERTY THAT TITLE IS GOOD** will not render the execution plaintiff liable to the purchaser for a failure of title, in the absence of proof that the representations were made by his procurement. *Id.*
5. **STATEMENTS MADE BY DEPUTY SHERIFF IN RELATION TO TITLE OF PROPERTY OFFERED FOR SALE on execution** are not within the scope of his authority. And the sheriff is not liable to a purchaser on account of such statements, where they are made by the deputy in good faith in the belief of their truth, and without the intent to deceive any person thereby. *Id.*

See EXECUTIONS, 3, 6-8, 12; INJUNCTION, 1, 3.

JURISDICTION.

1. **ACTIONS FOR DAMAGES FOR PERSONAL INJURIES, or for pecuniary loss resulting from the death of a person caused by the wrongful act, neglect, or default of another, are transitory in character, and arise out of the supposed violation of rights which, in legal contemplation, are neither local nor confined to the state where the right accrued.** *Cincinnati etc. R. R. Co. v. McMullen*, 67.

- 2. OF COURTS TO ENTERTAIN ACTIONS OR ENFORCE RIGHTS** which accrued in a foreign state does not depend upon whether the right sought to be enforced was of statutory or of common-law origin, provided it accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy is sought. *Id.*

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 12; JUDGMENTS, 2-4.

JURY AND JURORS.

See TELEGRAPHS, 8, 9.

LANDLORD AND TENANT.

- 1. DUTY TO KEEP STAIRWAY IN REPAIR.** — The owner of several tenements leased to different tenants with one stairway or passage-way for the accommodation of all, and used in common by them, is, in the absence of express agreement to the contrary, in possession of such passage-way, and bound to keep it in repair at his own expense, and liable for injury to any one of his tenants happening through a defect therein, where the tenant is without fault. *Sawyer v. McGillicuddy*, 260.
- 2. ASSIGNMENT OF LEASE.** — Lessee continues liable on his covenants in lease, notwithstanding his assignment of it, because of the continuance of his privity of contract with the lessor. An assignee of the lease is fixed with notice of its covenants, and takes the estate of his assignor *cum onere*, but as his liability grows out of privity of estate only with the lessor, it ceases when the privity ceases. *Washington Natural Gas Co. v. Johnson*, 553.
- 3. EACH SUCCESSIVE ASSIGNEE OF LEASE**, because of privity of estate, is liable upon covenants maturing and broken while the title is held by him, but is not liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor. *Id.*
- 4. ASSIGNEE OF OIL AND GAS LEASE** is not liable to lessor upon a covenant of the lessee to sink a well upon the leased premises, the time fixed in the lease for sinking the well having passed by before the acquirement by the assignee of title under the assignment. *Id.*

LIENS.

See Co-TENANCY.

LIMITATIONS.

- 1. ENCROACHMENT ON A PUBLIC STREET IS A NUISANCE, AND HOWEVER LONG CONTINUED** cannot ripen into prescriptive title of the part so encroached upon. *Yates v. Town of Warrenton*, 860.
- 2. THE DISABILITY OF AN INFANT WILL SAVE HIM FROM THE OPERATION OF THE STATUTE OF LIMITATIONS**, notwithstanding the next friend by whom he sues was under no disability, and could have brought the action at any time after the cause therefor accrued. *Frost v. Eastern R. R. Co.*, 396.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 10.

MALICIOUS PROSECUTION.

- 1. SEARCH-WARRANT.** — Action will lie for causing the issuance of a search-warrant maliciously and without probable cause. To sustain it, plain-

- tiff must establish want of probable cause on the part of defendant with reference to the action actually taken by the latter in the matter complained of. *Boeger v. Langenberg*, 322.
2. Party making complaint to a magistrate is not necessarily answerable for whatever judicial action the latter, of his own motion, may take in the premises. If he misconceives the remedy, without the suggestion or intervention of the complainant in that particular, the latter is not liable for such error. He is only responsible for the complaint he actually makes, and for such action thereon as may be lawful and proper in view of it. *Id.*
 3. SEARCH-WARRANT. — Where a complainant make affidavit of facts before a magistrate, and assists in writing out a search-warrant for his signature, this is sufficient evidence of his participation in the issuance of the warrant. *Id.*
 4. PROBABLE CAUSE CONSISTS of a belief in the facts or charge alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation. *Id.*
 5. Burden of proof is on plaintiff to show, in an action for malicious prosecution for arrest and search under an illegal warrant, that defendant had no probable cause for the charges made by him on which plaintiff was arrested and his premises searched, and the discharge of plaintiff from arrest is not of itself sufficient evidence. *Id.*
 6. PROBABLE CAUSE. — Dismissal by the prosecuting attorney, against the objection of complainants, of an illegal warrant of arrest does not raise any inference of want of probable cause on their part in obtaining it. *Id.*
 7. FALSE IMPRISONMENT. — Where, in an action, malicious prosecution is alleged in one count and false imprisonment in another, both based upon a search-warrant containing a clause of arrest, a recovery on one count is a bar to a judgment on the other. *Id.*
 8. Acquittal does not tend to establish want of probable cause for prosecuting an action of malicious prosecution. *Id.*

MANDAMUS.

See TELEPHONES, 3, 7.

MARRIAGE AND DIVORCE.

1. MARRIAGE VALID WHERE CELEBRATED IS, IN GENERAL, VALID EVERYWHERE. — Exceptions to or modifications of the general rule are, — 1. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2. Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication. *Pennegar v. State*, 648.
2. CONFLICT OF LAWS. — Where statutory prohibition in respect to marriage relates to form, ceremony, and qualification merely, compliance with the law of the place of marriage is sufficient, and the validity of the marriage will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. *Id.*
3. INVALIDITY OF MARRIAGE CELEBRATED IN ANOTHER STATE. — Under Tennessee statute (Milliken and Ventrees's Code, sec. 3332), a marriage between the guilty husband or wife, after a divorce for adultery, and

the person with whom the crime was committed, is prohibited during the life of the former consort; and if the contracting parties in such case, being citizens and residents of Tennessee, withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the statute in question, enacted in pursuance of a settled policy of the state, in the interest of public morals, peace, and good order of society, such marriage is void in Tennessee, though valid in the state where celebrated. *Id.*

See CITIZENSHIP.

MARRIED WOMEN.

1. **ESTOPPEL.** — Proposition that married woman cannot be estopped by her own act is by no means of universal application, even as between private parties. *Bigham's Appeal*, 522.
2. **ESTOPPEL TO DENY VALIDITY OF DECREE.** — Decree of court procured to be made by married woman will not be set aside at her instance after the termination of her coverture on the sole ground of her want of power to consent to the decree by reason of her coverture, where for a long period of time she has enjoyed the fruits of the decree, and she is the only person who complains of it. She is clearly estopped in such case from asserting the invalidity of the decree. *Id.*
3. **POWER OF MARRIED WOMAN TO CONVEY OR ENCUMBER HER SEPARATE REAL ESTATE** is wholly statutory, and any deed or other instrument purporting to convey or encumber her land in which her husband has not joined is absolutely void, because of the want of power or capacity on her part to execute such an instrument without being joined therein by her husband. *Cook v. Walling*, 17.
4. **WHEN MARRIED WOMAN DEALS, OR ASSUMES TO DEAL**, in respect to a matter concerning which her common-law disabilities have been removed, she will be bound by an estoppel *in pais* as any other person. But where the contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked to remove the incapacity. *Id.*
5. **INDIANA STATUTE OF 1831 AFFECTING MARRIED WOMEN** with estoppels *in pais* is inapplicable to prior contracts. *Id.*
6. **MARRIED WOMAN WHO, UPON ASSUMPTION THAT HER HUSBAND IS DEAD**, because absent and not heard from for more than seven years, marries another man, and while cohabiting with him in the honest belief that he is her husband, joins with him in mortgaging her separate real estate, may, upon the return of her lawful husband and the resumption of marital relations with him, avoid the mortgage by a plea that he did not join in its execution as the law requires. In such case the doctrine of estoppel has no application. *Id.*
7. **LIABILITY ON NOTE EXECUTED IN ANOTHER STATE.** — Note of married woman, executed by her and made payable in another state where she and the payee are both domiciled, and under whose laws she is clothed with all the powers of *feme sole*, so far as the right to contract and to sue and be sued are concerned, is valid in Tennessee, and she is liable thereon in the courts of such state, notwithstanding the existing disabilities of coverture. *Robinson v. Queen*, 690.
8. **CONVEYANCE OF SEPARATE ESTATE BY.** — Under Tennessee statute (Act of 1869-70, c. 99), a married woman owning a separate estate, without

restriction upon her power of disposition, may convey such estate without her husband joining in the deed, provided she has a privy examination before a chancellor or circuit judge of the state, or clerk of the county court, as required by the statute. *Id.*

9. **SEPARATE ESTATE.** — At common law, marriage vests in the husband the personal property of the wife then owned or thereafter acquired by her, and of which he obtains possession, but in equity she has a separate existence from her husband, and may have possession and ownership of property separate from him. *Botts v. Gooch*, 286.
10. **GIFT FROM HUSBAND** directly to his wife will, in many cases, be upheld in equity, and the same result follows the gift from a third person, where the husband assents and treats the property as belonging exclusively to the wife. *Id.*
11. **SEPARATE ESTATE.** — Where a married woman has received personal property from her father prior to the enactment of the Missouri married woman's act of 1875, and has always managed it as her own, and purchased other property with it in her own name with the consent of her husband, such property with its proceeds is her separate estate, and not liable for the debts of her husband, though he is insolvent. *Id.*
12. **MAY MAINTAIN AN ACTION OF EJECTMENT AGAINST HER HUSBAND** to recover possession of her separate estate. *Crater v. Crater*, 161.
13. **COULD NOT MAKE A VALID CONTRACT WITH HER HUSBAND** under the statute in force in 1866, that in consideration of his payment of certain claims or liens he should become a joint tenant with her of lands which then constituted her separate estate. *Id.*

MASTER AND SERVANT.

1. **SERVANT IS DEEMED TO BE IN MASTER'S SERVICE WHENEVER PRESENT TO PERFORM HIS DUTY** under the contract creating the relation of master and servant, and subject to orders, although at a given moment he may not be engaged in the actual performance of any labor. *East Line etc. R. R. Co. v. Scott*, 804.
2. **EVIDENCE SHOWING WHAT INQUIRY MASTER MADE AS TO COMPETENCY OF SERVANT**, and what knowledge he had, or obtained on inquiry, should be considered in determining the question whether or not he exercised due care to inform himself as to the competency of the servant. And if it be contended that a master knowingly employed an incompetent servant, it would seem that this fact ought to be established by evidence tending to show that the master had been in a position to know that the servant was incompetent, or the general reputation of the servant should be shown to be such as to induce the belief that his incompetency must have been generally known. *Id.*
3. **NEGLIGENCE.** — One who engages in service of railroad company is presumed to be acquainted with and to take upon himself all the ordinary risks incident to the service, including those arising from the negligent conduct of co-employees in whose selection and retention proper care has been exercised; and all those who are subject to the same general control, and are co-operating in the prosecution or accomplishment of the same general purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees. *Cincinnati etc. R. R. Co. v. McMullen*, 67.
4. **IT IS DUTY OF RAILROAD COMPANY TO PROVIDE AND MAINTAIN REASONABLY SAFE AND SUITABLE CARS** and other appliances for its employees

to work with, and it cannot escape liability to an employee who, without fault or neglect on his part, sustains injury because of a negligent failure to discharge that duty, no matter to whom the company may have committed its performance. *Id.*

5. **FELLOW-SERVANTS.** — Car-inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employee of a brakeman, or of one who is in the line of his service discharging the duties of brakeman, within the meaning of the common-law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant. *Id.*
6. **EMPLOYEE CONTINUING TO WORK AFTER HE KNOWS OF THE NEGLIGENCE** and dangerous manner in which his employer allows his business to be conducted does not assume the risk of such negligence, and may recover of his employer if injured thereby. *Richmond etc. R'y Co. v. Norment*, 827.
7. **MASTER IS BOUND TO USE ORDINARY CARE IN SUPPLYING AND MAINTAINING PROPER INSTRUMENTALITIES** for the performance of the work required, and generally to provide for the safety of his servant in the course of the employment to the best of his skill and judgment. *Id.*
8. **CO-EMPLOYEES, WHO ARE NOT.** — One employed to overhaul or repair railway cars is not a co-employee with a conductor or engineer of a shifting-engine, when he is not under the orders of nor of the same grade nor line of duty with either. *Id.*
9. **RAILWAY COMPANY IS GUILTY OF NEGLIGENCE, AND LIABLE TO ITS EMPLOYEE** injured thereby, when it puts him to work overhauling or repairing a car, where it is necessary for him to be between two cars, and it causes another car to be shifted on the same track and driven against that on which he is at work, without giving any previous warning. *Id.*
See CARRIERS, 1; RAILWAYS, 11, 12.

MORTGAGES.

1. **IDEM SONANS.** — Where the name Kealiher is spelled Keoliher, Kelliher, Kellier, Keolhier, Kelhier of Lagrange, in proceedings against Eliza A. Kealiher to foreclose a mortgage, the names are *idem sonans*, and sufficient to identify the defendant. *Millett v. Blake*, 275.
2. **ASSIGNEE OF MORTGAGE**, who has no interest therein at the time of an attachment of the equity of redemption, though a necessary party to the action, is not entitled to tender nor demand of the amount due on the mortgage by the plaintiff claiming the right of redemption under the attachment. *Id.*
2. **CHATTEL MORTGAGE ON UNPLANTED CROP.** — A chattel mortgage given upon an unplanted crop of corn creates no lien on the crop afterward planted and grown which will defeat the levy of an execution thereon made at the instance of a creditor of the mortgagor before possession of the crop taken by the mortgagee, although the mortgage was duly filed for record before the levy was made. *Long v. Hines*, 189.
4. **MORTGAGE OF GOODS OR OTHER PERSONAL PROPERTY** not owned by mortgagor at time of making or recording the mortgage is void as against subsequent purchasers or attaching creditors, although the mortgagor may afterwards acquire the property. *Long v. Hines*, 192.
5. **UNPLANTED CROP.** — Chattel mortgage of crop to be grown in future, but which has not been planted at the time of the execution of the mortgage, is void as against subsequent purchasers or attaching credi-

tors, although the mortgagor was in possession of land when the mortgage was executed. *Id.*

See CONSTITUTIONAL LAW, 9; NEGOTIABLE INSTRUMENTS, 6; SUBROGATION, 4-6.

MUNICIPAL CORPORATIONS.

1. **POWER TO ENACT CITY ORDINANCE** must be vested in governing body of city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation, and not simply convenient. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. *Anderson v. City of Wellington*, 175.
2. **ORDINANCES PASSED BY GOVERNING BODY OF CITY** must be reasonable, not inconsistent with the laws of the state, nor repugnant to the fundamental rights; they must not be oppressive, partial, or unfair, nor make special or unwarranted discriminations, and must not contravene common right. *Id.*
3. **STREET PARADES—ILLEGAL ORDINANCE.**—City ordinance declaring it unlawful for any persons, society, association, or organization to parade any public street, avenue, or alley of the city, shouting, singing, or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended, or calculated to attract or call together an unusual crowd of people upon such street, etc., without first having obtained in writing the consent of the mayor, or, in his absence, the president of the city council, city clerk, or city marshal, in the order named, authorizing such parade, is illegal and void, as being of doubtful delegated power, unreasonable, partial, and in contravention of common right. *Id.*
4. **ORDINANCE OF A MUNICIPAL CORPORATION REQUIRING A RAILWAY CORPORATION TO KEEP A FLAG-MAN** to give warning to travelers at the crossing of its railroad track on a designated street, and to have gates erected at such crossing, is a valid local law. *Pennsylvania Co. v. Stegemeier*, 136.
5. **ORDINANCE OF MUNICIPAL CORPORATION AUTHORIZING THE DEPOT-MARSHAL TO PRESCRIBE THE PLACES** where omnibuses, hacks, and other vehicles shall stand at the railroad depot, and requiring drivers to obey the directions of police-officers in regard to such places, is valid. *Veneman v. Jones*, 100.
6. **IS NOT LIABLE FOR FAILURE** to exercise legislative or judicial powers, nor for a negligent exercise of such powers, but only where it negligently performs or fails to perform a ministerial duty imposed by law. *City of Anderson v. East*, 35.
7. **OWES DUTY** to those who use its streets to exercise ordinary care to make them safe for passage. *Id.*
8. **IS NOT CHARGED WITH DUTY OF PROTECTING** the private property of a citizen from injury from the walls of an adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous. *Id.*
9. **CITY IS LIABLE FOR INJURIES SUFFERED FROM KEEPING A WAGON IN ITS STREETS**, when it was so kept there by its license, granted for compensation, and without authority, though the particular injury in question resulted from the negligence of the owner of the wagon in tying up its

- thills in a perpendicular manner, and from their falling upon and killing the person for whose death the action is brought. *Cohen v. New York*, 506.
10. **LIABILITY FOR NEGLIGENCE.** — City is guilty of negligence in permitting dangerous machinery to remain for years in an alley of the city, and so likewise is the owner of adjoining lots who placed it there; and both are liable for injuries sustained by a child under nine years of age who was hurt by falling upon such machinery. *Osage City v. Larkin*, 186.
 11. **AUTHORITY OF TOWN TREASURER TO CONVEY LANDS.** — A town treasurer cannot, of his own volition, and without express authority from the town, convey its title to land; and a note given in payment of such unauthorized conveyance is without consideration and void. *Inhabitants of Monson v. Tripp*, 235.
 12. **AUTHORITY OF TOWN TREASURER TO CONVEY LANDS — ESTOPPEL.** — Where a town treasurer has conveyed town land without authority, and accepted a note in payment, the fact that he conveyed other portions of the land to other parties does not constitute an estoppel to setting up the invalidity of the note in an action thereon. *Id.*
 13. **LIABILITY TO GARNISHEE PROCEEDINGS.** — The term "corporation," as used in Kansas Compiled Laws of 1879, chapter 81, section 54 a, has reference solely to private corporations organized for private purposes, and does not include municipal corporations; and a city of the second class cannot be required to answer as garnishee, and is not liable under the provisions of said statute. *Switzer v. City of Wellington*, 196.
 14. **CITIES ARE EXEMPTED FROM GARNISHEE PROCESS**, upon the ground of public policy, for the reasons that it would impair their usefulness and power in the discharge of their functions, drawing them into litigation, and occupying the time of their officers in expensive and vexatious suits in which they had no interest, and compelling them to expend the money of the people and the time of their officials on a matter wholly foreign to their creation. *Id.*

See DEDICATION, 1, 2; NUISANCE, 1, 2.

NEGLECT.

1. **IT IS DUTY OF PROPERTY OWNER WHO MAINTAINS COALHOLE IN CITY SIDEWALK** in front of his premises to exercise reasonable care and diligence in keeping it safe and secure, such owner being bound to know that persons will pass and repass, and step upon the cover without apprehending danger, not only in the daytime, but also in the night-time. *Dickson v. Hollister*, 533.
2. **TO CHARGE PROPERTY OWNER WITH NOTICE OF DEFECTIVE CONDITION OF COAL-HOLE** which he maintains in a city sidewalk in front of his premises, it is not necessary, in order to affect him with negligence, that the defect should be so notorious as to be evident to all pedestrians passing in the immediate neighborhood. Whether the cover was made and adjusted in a way that was reasonably safe and secure is a question for the jury. *Id.*
3. **IT IS DUTY OF PEDESTRIAN UPON PUBLIC HIGHWAY TO USE** reasonable care for his own safety, and to avoid an open or apparent danger; but as the cover of a coal-hole in a sidewalk constitutes a part of it for persons to tread upon, a passer-by is not guilty of contributory negligence in failing to exercise that critical care which would involve a particular examination of its structure and adjustment before stepping upon it. *Id.*

4. **INDEPENDENT CONTRACTOR.** — Where a blacksmith is employed by a property owner to secure the cover over a coal-hole which the latter maintains in a sidewalk in front of his premises, the former, being subject to the direction and control of his employer, and liable to be dismissed at any stage of the work, is not to be regarded as an independent contractor, for whose negligence the property owner would not be liable. *Id.*
5. **PROXIMATE CAUSE.** — In action for damages for personal injury sustained by the plaintiff through the alleged negligence of the defendant, resulting in a wound in which erysipelas developed in a few days from occult causes not attributable to treatment, improper habits, or peculiar constitutional tendencies, it is not error to instruct the jury that even if the erysipelas was not the immediate result of the injury, it might nevertheless be regarded as part of the injury itself. *Id.*
6. **OWNER OF BUILDING ON SIDE OF PUBLIC ALLEY IN CITY WHO NEGLIGENTLY PERMITS** the walls thereof, weakened and made dangerous by fire, to remain unsupported is liable to the owner of a building on the opposite side of the alley for injury thereto caused by the ruined walls falling upon it, although the city marshal volunteered to take charge of the walls and the owner assented. *City of Anderson v. East*, 35.
7. **PRESUMPTION — RAILROADS.** — The rule that the mere happening of an injurious accident to a passenger while in the hands of a carrier raises a *prima facie* presumption of negligence, and throws the *onus* of proof on the carrier that it did not exist, cannot be invoked where there is neither proof nor admission tending to connect the carrier or his servants, or any of the appliances of transportation, with the happening of the injury. *Pennsylvania R. R. Co. v. MacKinney*, 601.
8. **PRESUMPTION — PASSENGER ON RAILROAD.** — Where a passenger on a railroad train is sitting at an open window, and observes one of the same company's trains passing in an opposite direction, at the same time receiving a violent blow on the eye from a piece of slate or coal, hurled with considerable force through the window, causing the injury complained of, no presumption of negligence arises against the company or its employees, in the absence of proof connecting them with the throwing of the missile. *Id.*
9. **IN AN ACTION TO RECOVER FOR INJURIES SUFFERED FROM ALIGHTING FROM A TRAIN** at a particular point, evidence may be received from a person other than the plaintiff that he got out of the cars several times at the same place, and when the situation was the same as when plaintiff was injured, and that it shook him up. Such evidence is admissible, because it tends to show that the defendant was negligent in not providing a platform, and that passengers left the trains at that place with its knowledge or permission. Evidence is also admissible in such action to show that the conductor generally required passengers for that station to take seats in the rear car, and that the taking of such seats would compel them to alight at the place where plaintiff was injured. *Bulard v. Boston & M. R. R.*, 367.
10. **LIABILITY OF RAILWAY COMPANY FOR INJURIES SUFFERED BY PLAINTIFF IN ALIGHTING AT A PLACE OTHER THAN THE PLATFORM.** — A nonsuit is properly refused in an action against a railway company for injuries sustained in alighting from its cars, when there is evidence tending to show that the plaintiff alighted at a place which she knew to be a bad one, but that the car in which she was riding was stopped at that place;

- that the conductor had assisted her to alight at the same place a short time before; that she was in that car by the conductor's direction; that passengers were not allowed to go forward from one car to another in leaving trains, and were accustomed to leave the train at the same place. *Id.*
11. OF DRIVER OF A VEHICLE IS NOT IMPUTED TO A PASSENGER THEREIN when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection. *Noyes v. Boscawen*, 410.
 12. IF PHYSICIAN COULD NOT HAVE REACHED PATIENT IN TIME to attend her in confinement, even had there been no negligence on the part of the telegraph company in delivering the message sent to him, no recovery can be had for the pain and suffering resulting to her by reason of the fact that he was not present to aid in the delivery of the child, and a charge presenting this question should be given to the jury. *Western Union Tel. Co. v. Cooper*, 772.
 13. WHERE THERE IS TESTIMONY OF SEVERAL FACTS FROM WHICH NEGLIGENCE MAY BE INFERRED, it is not error to refuse an instruction pointing out a single fact in evidence as insufficient to prove negligence. *East Line etc. R. R. Co. v. Scott*, 804.
 14. CONTRIBUTORY, WHEN FACT FOR JURY. — Whether or not the act of an engineer in leaving his engine when the train stopped, and going to another car in the train, where an explosion occurs through which he is injured, is contributory negligence on his part, is a question for the jury. *Id.*
 15. CONTRIBUTORY, IN CROSSING RAILROAD TRACK. — If a railroad company has, by its conduct and its published regulations, led the public to believe that trains would not run on its tracks at specified times and places, persons having occasion to cross them have the right to rely on the assurance of the company, and are not necessarily guilty of negligence when injured by prohibited trains while so doing. *Parsons v. New York Central etc. R. R. Co.*, 450.
 16. CONTRIBUTORY, WILL NOT BE IMPUTED, AS A MATTER OF LAW, to a person injured by a railway train merely because it was possible for him to have discovered its approach. The question is, whether the injured party, under all the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. *Id.*
 17. CONTRIBUTORY, IN CROSSING RAILWAY—WHAT EXONERATES PERSON INJURED FROM CHARGE OF. — One who reaches a railway crossing in a city at which the railway company is required by municipal ordinance to keep a flag-man to warn persons of impending danger, and to have gates by which such crossing is to be closed when trains are passing, and who finds the gates open and no flag-man in sight, is justified in the belief that no trains are about to pass, and is not guilty of contributory negligence in attempting to travel upon such crossing. *Pennsylvania Co. v. Stegemeier*, 136.
 18. CONTRIBUTORY — ONE BROUGHT INTO DANGER BY THE WRONG OF ANOTHER is not bound when confronted by sudden and unexpected peril to act with coolness and deliberation. Hence where a man went upon a railroad crossing when the local law and the custom of the railway company gave him assurance that the tracks were clear and the crossing safe, and he there found two trains rapidly approaching him on

different tracks, and in opposite directions, and was struck by one of them, he cannot, as a matter of law, be adjudged guilty of such contributory negligence as bars recovery; for he was thrown off his guard, and exposed to a sudden danger that he had a right to expect would not be encountered. *Id.*

19. CONTRIBUTORY, WHEN INSUFFICIENT TO PREVENT RECOVERY. — Mere negligence or want of ordinary care will not disentitle plaintiff to recover, unless it is such that, but for it, the misfortune could not have happened; nor if the defendant might, by the exercise of care on its part, have avoided the consequences of the negligence and carelessness of the plaintiff. *Virginia Midland R'y Co. v. White*, 874.

See CARRIERS, 5, 7-10; HOMICIDE, 7; MUNICIPAL CORPORATIONS, 10; RAILWAYS, 17-21, 24.

NEGOTIABLE INSTRUMENTS.

1. ALTERATION OF NOTE. — The unauthorized alteration of a note by inserting in it the words "or bearer" after the name of the payee will not avoid it, if done innocently, without fraudulent or improper motive. *Croswell v. Labree*, 238.
2. ALTERATION OF NOTE — BURDEN OF PROOF. — The unauthorized alteration of a note by inserting the words "or bearer" after the name of the payee is a material alteration, and the burden of proof is on the holder to show that the alteration was innocently made. *Id.*
3. PAYMENT OF NEGOTIABLE PAPER ISSUED IN NEW YORK IN COURSE OF SPECULATION in cotton options in that state will be enforced in Indiana in the hands of an innocent holder, the statutes of neither state declaring such paper void in the hands of such a holder. *Sondheim v. Gilbert*, 23.
4. WHEN PARTNERSHIP IS ENGAGED IN COURSE OF BUSINESS IN WHICH USE OF COMMERCIAL PAPER IS APPROPRIATE, the firm is liable upon such paper, in the hands of a *bona fide* holder, when issued in the firm name by one of its members, although it may have been issued in violation of his duty, without the knowledge or consent of the other members. *Id.*
5. NEGOTIABLE PROMISSORY NOTE RESULTING FROM OR GROWING OUT OF WAGERING or gambling transaction is invalid as between the parties, on general common-law principles, but is valid in the hands of a third person who takes it in due course of trade, before maturity, for value, and without notice of the purpose for which it was executed or drawn, unless declared to be void by the peremptory words of a statute. *Id.*
6. RIGHTS OF HOLDERS OF NOTES SECURED BY MORTGAGE. — As a general rule, when the holder of a number of promissory notes secured by mortgage parts with some of them, retaining the rest, and the sum realized from a sale of the mortgaged premises proves insufficient to pay the notes in full, distribution must be made *pro rata* among all the holders; but if the original holder transfers a part of the notes by indorsement for value, he thereby becomes a surety to the indorsee, and if he afterwards becomes insolvent, neither he nor his assignee for the benefit of creditors can receive payment out of the proceeds of the sale of the mortgaged premises until the holders of the notes so transferred are paid in full. *Fourth National Bank's Appeal*, 538.

See MARRIED WOMEN, 7; SURETYSHIP, 1.

NEW TRIAL.

1. **COURT MAY IMPOSE TERMS** upon granting a new trial. *Crew v. McCafferty*, 578.
2. **ABSENCE OF COUNSEL.** — Where a cause comes on for trial in its regular order, under the rules of the court in which it is at issue, at a time when counsel, owing to a different rule in an adjoining circuit, does not expect it to come on, and in consequence of which he is not present at the trial, this is no ground for a new trial, in the absence of misrepresentations or bad faith on the part of counsel on the other side. *Holloway v. Holloway*, 339.
3. **STATEMENT BY COUNSEL OF A FACT NOT IN EVIDENCE** will entitle his adversary to a new trial, though on exception being taken to the statement the court sustained the exception, and instructed the jury to disregard the statement, and the counsel said "he would take it all back," unless it appears from the record that the decision of the jury was not affected by the admitted wrong. *Bullard v. Boston etc. R. R.*, 367.

NUISANCE.

1. **KEEPING OR STORING A WAGON IN THE PUBLIC STREET** perpetually or habitually is a nuisance. Its owner can acquire no right under license from the municipality to maintain such nuisance. *Cohen v. New York*, 506.
2. **LIABILITY OF CITY FOR.** — If a city, without authority, and in violation of statute, assumes to grant an individual the right to obstruct the public highway while in the transaction of his business, and for such privilege takes compensation, it must be regarded as itself maintaining the nuisance so long as the obstruction is continued by reason of and under its license, and must be liable for all damages which may naturally result to a third party who is injured in his person or property by reason or in consequence of placing such obstruction in the highway. *Id.*

See LIMITATIONS, 1.

OFFICE AND OFFICERS.

1. **OFFICER OF A CITY MAY RECOVER HIS SALARY** from such city during a time when he had been wrongfully removed from the office, and it was in the possession of another person, who had been appointed to fill the vacancy made by such removal, though the city paid such salary to the incumbent of the office, if at the time of such payment it had notice that the officer *de jure* denied the validity of the proceedings resulting in his removal. *Andrews v. Portland*, 280.
2. **OFFICER DE FACTO HAS NO LEGAL RIGHT TO THE EMOLUMENTS OF AN OFFICE**, the duties of which he performs under the color of an appointment, but without legal title. *Id.*
3. **RECOUPMENT.** — In an action against a city by an officer *de jure* for his salary during the time he was kept out of his office, the city is not entitled to a credit by way of recoupment of the amount which the plaintiff earned by his personal services during the time involved. *Id.*
4. **OFFICIAL TITLE IS NOT TRIABLE COLLATERALLY**, and cannot be attacked except in an appropriate action brought for the special purpose of establishing the legal title, in which action the officer *de facto*, being a party, will be bound by the judgment. *Jewell v. Gilbert*, 357.

5. **DEPUTY SHERIFF IS AN OFFICER DE FACTO**, though his appointment is not under seal, when the statute requires it to be sealed; and the service of a writ by him as such deputy is valid. *Id.*
 6. **ACTS OF AN OFFICER DE FACTO ARE VALID WHEN THEY CONCERN** the public or third persons; and their validity cannot be impaired by evidence tending to overcome the presumption that he is an officer *de jure*. *Id.*
- See** ARREST, 1-3; BONDS, 1, 2; CONSTITUTIONAL LAW, 10-21; DEPOSITION; EXECUTIONS, 2-6; JUDGMENTS, 5; JUDICIAL SALES, 3-5; QUO WARRANTO; TRIAL, 3.

PARENT AND CHILD.

See GIFTS, 1.

PARTITION.

1. **IN PARTITION SUIT**, the order of sale is not a final judgment from which an appeal will lie. *Holloway v. Holloway*, 339.
2. **CHANCERY HAS JURISDICTION** in partition suits; and as incident thereto, and in order to do complete justice and avoid a multiplicity of suits, it will take an account of the mesne rents and profits in perception by one tenant in common to the exclusion of the other, and of money paid to remove an encumbrance on the common property by one of the tenants. *Id.*
3. **RENTS AND PROFITS — ENCUMBRANCE.** — Where one co-tenant is in receipt of all the rents and profits, and in the exclusive use and enjoyment of the whole premises, refusing to let his co-tenant in, and such ousted co-tenant has paid money to relieve the common property of encumbrances in whole or in part, the court will declare a charge in favor of the ousted tenant for the amount of his share of the rents and profits, and for the amount such ousting co-tenant ought to have contributed in discharge or reduction of the encumbrance on the share of such tenant, to be paid out of the proceeds of the sale of the property in partition before division thereof is made between the tenants, according to their respective rights and interests in the premises. *Id.*
4. **RENTS AND PROFITS — PLEADING.** — An averment in an action for partition that the annual rents and profits are a certain amount, and that defendant as co-tenant is in exclusive reception thereof, and refuses to allow plaintiff any part thereof, is not a certain and definite allegation that plaintiff has been ousted from the joint occupancy of the land; and if defendant desires to take advantage of such uncertainty, he must move to have the complaint made more definite and certain instead of aiding it by answer that he is in actual and exclusive possession, and that plaintiff has no possession, right, title, interest, or estate in the land. *Id.*
5. **PARTITION — RENTS AND PROFITS — APPEAL.** — Where the court in a partition suit is authorized by the pleadings, it may find the value of the rents and profits from the time of defendant's ouster of his co-tenant until the day of sale, and charge them upon defendant's share of the proceeds of such sale; but it cannot declare plaintiff's share of the rents and profits for a particular year a lien on the crops for that year, and order that special execution issue therefor; such an order is void, and cannot have the effect of converting an otherwise interlocutory order of sale into a final judgment from which an appeal will lie. *Id.*

6. **PARTITION — EJECTMENT — ADVERSE TITLE.** — In partition, the adverse claims of parties to the same undivided interest in real estate may be decided, and it is only when the defendant is in adverse possession of the whole premises, claiming title adversely to one who claims to be his co-tenant, that such co-tenant can be driven to the action of ejectment; but apart from such adverse possession alone, without showing to any title to plaintiff's undivided interest, and without evidence casting doubt upon his title, he cannot be compelled to resort to ejectment. *Id.*
7. **PARTITION — JURISDICTION.** — Where in partition by one tenant against his co-tenant in possession the latter alleges that the title claimed by plaintiff belongs in equity to a third person, and that to establish such equity it may be necessary to invoke the powers of a court of equity, the court having charge of the partition proceedings will entertain jurisdiction and decide the matter. *Id.*
8. **PARTITION — EQUITABLE INTEREST — JURISDICTION.** — Where in an action for partition of an equitable interest by one co-tenant against his co-tenant in adverse possession, and the legal title is in defendant, who is a trustee, while the equitable title of plaintiff is attempted to be put in issue, the latter title may be tried in the action. *Id.*
9. **PAROL PARTITION OF LANDS AMONG JOINT TENANTS OR TENANTS IN COMMON** is not within either the statute of frauds or the statute regulating the transfer of the real estate of married women. *Aycock v. Kimbrough*, 745.
10. **PARTY FAILING TO SHOW ANY INTEREST IN LANDS PARTITIONED CANNOT COMPLAIN** of any error in the proceedings by which such lands are partitioned. *Id.*
11. **PAROL PARTITION IS NOT AFFECTED BY REGISTRATION LAWS**, and after such partition is made, the levy of an execution upon lands allotted to others than the defendant in execution will not affect the rights of those to whom the partition was made. *Id.*

PARTNERSHIP.

1. **ONE OF SEVERAL PARTNERS HAS NO AUTHORITY**, without the consent of the other partners, to make a general assignment of the firm property for the benefit of creditors. *Shattuck v. Chandler*, 227.
2. **SOLE SURVIVING PARTNER MAY MAKE GENERAL ASSIGNMENT** of the firm property for the benefit of the firm creditors, in the absence of any statute providing for the winding up and settlement of partnership estates. *Id.*
2. **SETTLEMENT OF ESTATES OF.** — Kansas Compiled Laws of 1885, article 2, chapter 37, make ample provision for the winding up and settlement of partnership estates, either by the surviving partner or by the administrator of the deceased partner's estate, and such provision precludes the doing of it in any other manner. *Id.*

PAYMENT.

1. **PARTY PAYING MONEY HAS RIGHT TO DIRECT ITS APPROPRIATION**, and where, pending the adjustment of a disputed liability, the debtor sends his creditor money as a payment in full of the demand, it is the duty of the creditor to accept the money for the purpose for which it was offered, or to return it, and his refusal to return it will be deemed an election to accept it for the purpose offered. *Washington Nat. Gas Co. v. Johnson*, 553.
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2. **PAYMENT IN FORGED PAPER, SPURIOUS BILLS, OR IN BASE COIN IS VOID** and leaves the original debt in full force and effect, where there has been no fraud nor improper conduct on the part of the payee, alike whether it be received in payment of an antecedent debt or for goods or other present consideration. *Bank v. Buchanan*, 617.

See **BONDS**, 1.

PLEADING.

1. **DEMURRER TO PLAINTIFF'S EVIDENCE ADMITS** the truth of all the evidence adduced by him, and all inferences that may be reasonably drawn therefrom, and withdraws from consideration all favorable evidence except upon points where there was no conflict. *Pennsylvania Co. v. Stegemeier*, 136.
2. **PLEA OF RELEASE PUIS DARREIN CONTINUANCE** is defective unless it alleges the time and place when and where the release was made and delivered, and the day of the last continuance, or that there was a continuance. *Field v. Cappers*, 237
3. **PLEA PUIS DARREIN CONTINUANCE — REPLEADER.** — Where plea of release *puis darrein continuance* is held bad on demurrer, a repleader on terms may be granted in the discretion of the court. *Id.*
4. Though a particular defense is not set up in the answer, yet if at the trial all facts pertaining to such defense were proved without objection or dispute, and are found by the court, objection cannot be made for the first time in the appellate court that the answer is defective in not setting out such defense. *Fowler v. Bowers Savings Bank*, 47.

See **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, 13; **DAMAGES**, 1, 2; **EVIDENCE**, 6; **GIFTS**, 2; **JUDGMENTS**, 10; **PARTITION**, 4.

POLICE POWER.

See **CONSTITUTIONAL LAW**, 1.

POST-OFFICES.

1. **PRESUMPTION.** — **ADDRESS ON ENVELOPE WILL BE PRESUMED TO CORRESPOND TO ADDRESS ON LETTER**, in the absence of evidence to the contrary. *Phelan v. Northwestern L. Ins. Co.*, 441.
2. **LETTER WILL NOT BE PRESUMED TO HAVE REACHED PERSON** to whom it was addressed on the day of its date, nor at any time earlier than it is actually shown to have been in his possession, when it is found among his papers after his death, but is addressed to him at a place other than his regular post-office address. *Id.*

PROCESS.

SERVICE OF PROCESS UPON NON-RESIDENT. — Resident of another state who goes into the state of Indiana to testify as a witness in an action in which he is a party cannot be legally served with a summons at the suit of the party plaintiff in the action he goes to defend. Indiana Revised Statutes of 1881, section 312, providing for the service of summons upon non-residents, is not applicable to such a case. *Wilson v. Donaldson*, 48.

QUO WARRANTO.

TITLE TO OFFICE IN SCHOOL BOARD. — Court is invested with some discretion in granting the extraordinary remedy of *quo warranto*, and will refuse

the remedy to one who seeks thereby to become invested with the office of member of a district school board, such person claiming at the same time to maintain and continue contract relations with said board, previously entered into, requiring him to perform work and furnish materials used therein, under the supervision and control of the members of said board. The statute (Kansas Comp. Laws of 1885, c. 31, sec. 334) forbids that he should occupy the incompatible positions of member of the board and also contractor with it. *Weston v. Lane*, 224.

RAILWAYS.

1. **CONSEQUENTIAL INJURY FROM CONSTRUCTION.** — Plaintiff is entitled to consequential damages arising from the construction and operation of a railroad when the track is laid so close to the curbstone on the side of the street next to his property as to render the means of access thereto dangerous or cut off entirely, and this though the track was laid on the public street under authority, and no land was taken from plaintiff, nor the grade of the street changed, nor negligence on the part of the company in constructing and operating the road. *Pennsylvania Schuylkill Valley R. R. Co. v. Walsh*, 611.
2. **QUESTION OF REASONABLENESS OF RULE ESTABLISHED BY RAILROAD COMPANY**, if the facts are undisputed, is a proper one for the court; but when such reasonableness depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court. *Pittsburgh etc. R'y Co. v. Lyon*, 517.
3. **REGULATION OF RAILROAD COMPANY IS UNREASONABLE AND VOID** under which the sale of tickets to any regular stopping station of a train is refused, or by which, although a passenger holding a through-ticket may himself get off at any such station, he is not permitted also to remove his baggage. *Id.*
4. **ANY REGULATION THAT DEPRIVES PASSENGERS** of the right to stop and receive their baggage at any regular station or stopping-place for the train on which they may be traveling is necessarily arbitrary, unreasonable, and illegal. *Id.*
5. **THERE IS NO LEGAL PRESUMPTION THAT IT IS DUTY OF CONDUCTOR** of railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars, if the defect was such that it might have been discovered by inspection. *Cincinnati etc. R. R. Co. v. McMullen*, 67.
6. **EVIDENCE.** — Parol evidence is not admissible to prove that it was the duty of a freight-train conductor on the company's road to inspect and determine the condition of the couplings and brakes connected with his train, in the absence of any showing that such duty was not prescribed by some written or printed rules adopted and promulgated by the company. *Id.*
7. **RULES OF ANOTHER, SEPARATE, AND APPARENTLY INDEPENDENT RAILROAD COMPANY** are not competent evidence to show the duties of freight conductors on the defendant company's road, until it is shown by some competent evidence that they had been adopted and promulgated as the rules of the defendant. *Id.*
8. **CIRCUMSTANTIAL EVIDENCE.** — In an action against a railroad company for damages for negligently causing the death of the plaintiff's intestate, if, from all the facts and circumstances proved, the inference arises that the deceased was exercising due care, and that his

- death was caused while using a defective brake on one of the defendant's cars, a recovery is justified, although no direct evidence is given by witnesses of the accident. *Id.*
9. INSTRUCTION TO JURY. — In such a case, it is not the province of a court to say to a jury, as matter of law, what facts and circumstances were sufficient to show that the death of the plaintiff's intestate was caused by defective machinery. *Id.*
 10. COMPANY CANNOT RELIEVE ITSELF FROM LIABILITY FOR INJURY TO EMPLOYEE, resulting from a failure on its part, through its agents, actually to use such care for the safety of employees as the law makes it necessary for such a master to use, by making and enforcing regulations, unless the regulations be such, and their enforcement so complete, as to result in the actual use of due care. *Missouri etc. R'y Co. v. McElyea*, 749.
 11. COMPANY IS LIABLE TO EMPLOYEE WHO SUFFERS INJURY from the failure of its agents, authorized to do what it is bound to do to avoid liability, to perform their duty, although it make regulations requiring the most rigid and frequent inspections of its machinery, road-bed, and equipments, and the most prompt and complete repair of any ascertained defect, and, for the failure of its agents to comply with any of these regulations, make and enforce an absolute rule that a failure to rigidly comply therewith will be followed by the immediate discharge of the delinquent and forfeiture of wages earned, or other penalty. *Id.*
 12. WATCHMAN DIRECTED BY LOCOMOTIVE ENGINEER DISABLED BY SICKNESS TO TAKE CHARGE OF ENGINE is, while running the engine, an employee of the company, and as such entitled to recover damages for injuries received by him from imperfect machinery furnished by the company for use in its service, notwithstanding a rule of the company forbade the engineer to permit any person other than himself to take charge of the engine, where it is shown that such rule was not intended to be enforced when, on account of the sickness of the engineer, it became necessary for his duties to be performed by another. *East Line etc. R. R. Co. v. Scott*, 804.
 13. INJURY AT CROSSING — NEGLIGENCE. — Where in an action to recover for injuries received at a railroad crossing it appears that the company had for some time kept a watchman and safety-gates there, which were lowered upon the approach of trains, but upon the night when the accident happened they were not lowered, as they had become out of order in the morning, and had not been repaired; that the watchman displayed no light and gave no warning; that a horse-carriage, as it approached the crossing, did not stop, nor even slacken its speed, in order to afford an opportunity to look and listen, but continued on, was struck by the train, and the plaintiff thus thrown from the carriage and injured, — he is not entitled to recover, because of his contributory negligence in failing to "stop, look, and listen" before attempting to cross the track. *Greenwood v. Philadelphia etc. R. R. Co.*, 614.
 14. DUTY OF TRAVELER AT CROSSING. — The rule requiring one to "stop, look, and listen" for trains before attempting to cross the track is a clear and certain rule of duty, as applicable in towns and cities as in the country, and a departure from it is more than evidence of negligence: it is negligence *per se*. *Id.*
 15. RAILROAD IS NOT EXONERATED FROM LIABILITY by the fact that the injury complained of was the result of its engineer's being temporarily dis-

- abled from controlling his engine by an accident received from the lever, which slipped from its position after being reversed, and struck him a violent blow, if the remedies for such a fault on the part of the lever are so numerous and common that they must be presumed to be within the knowledge of all intelligent persons. *Parsons v. New York Central etc. R. R. Co.*, 450.
16. NEGLIGENCE. — Reliance upon a lever which is liable to be forced from its place by the natural action of the machinery is an act of grossest carelessness. *Id.*
 17. NEGLIGENCE. — COMPANY IS NOT TO BE EXCUSED FROM THE CONSEQUENCES OF RUNNING TRAINS AT GREAT SPEED through stations or in the streets of a populous city by the impossibility of its servants to control the powers which propel them. *Id.*
 18. CONTRIBUTORY NEGLIGENCE. — PERSON TRAVELING ON OR ACROSS THE TRACK OF A RAILWAY in a frequented part of a city is not negligent because he relies on the performance of their duties by the agents of the railroad company. *Virginia Midland R'y Co. v. White*, 874.
 19. COMPANY IS GUILTY OF NEGLIGENCE WHEN, IN DISOBEDIENCE OF AN ORDINANCE of a city, it backs a train along a frequented track in such city at a rate of speed forbidden by such ordinance, without ringing any bell, or giving any other signal of its approach. *Id.*
 20. NEGLIGENCE. — USE OF ORDINARY CARE BY THE ENGINEER after he discovered the danger in which the deceased was placed will not relieve the company from liability, if the engineer was guilty of negligence in running his locomotive in a frequented part of the city at a rate of speed forbidden by its ordinance, and without ringing any bell or giving any signal to warn travelers of approaching danger. *Id.*
 21. DUTY OF COMPANY TO THE LICENSEE ON ITS TRACK is to exercise toward him ordinary care and prudence. *Id.*
 22. ONE MUST BE TREATED AS A LICENSEE, AND NOT AS A TRESPASSER, on the tracks of a railway, when they have been for years used by the public as a foot-path between certain points, with the acquiescence of the company. *Id.*
 23. NEGLIGENCE. — One who attempts to cross railroad track in front of approaching train, which he must have seen had he used his eyesight, and is struck and injured, is guilty of such contributory negligence as will defeat any recovery by him in an action against the railroad company. *Marland v. Pittsburgh etc. R. R. Co.*, 541.
- See EMINENT DOMAIN, 1-3; EVIDENCE, 8-10; MASTER AND SERVANT, 3-5, 9; MUNICIPAL CORPORATIONS, 4; NEGLIGENCE, 15-18; TRESPASS, 4.

REFORMATION.

See JUDGMENTS, 8.

REPLEVIN.

See SALES, 5.

RESCISSION.

See DEEDS, 1, 2.

REWARDS.

- 1 OFFER OF REWARD FOR ARREST OF CRIMINAL, WHEN ACTED UPON, IS BINDING upon the party making it. His secret motives for making the offer

form no part of the contract with the party acting upon it, nor will the fact that he expected others than the one arrested and proved guilty to be arrested relieve him from his offer, when it has been acted upon. *Kasling v. Morris*, 797.

2. **CONSTABLE MAY CLAIM REWARD FOR MAKING ARREST NOT REQUIRED BY HIS OFFICIAL DUTY**; as where he makes the arrest without a warrant, without having seen the offense committed, and without information that the person he arrested was the guilty party. *Id.*

ROBBERY.

INFORMATION FOR ROBBERY DESCRIBING the property taken as "twenty-five dollars in money, the said money then and there being the property of the said John Bond," but not alleging its value, or that it was of any value, or giving any excuse for the want of a more particular description, is fatally defective, and insufficient to sustain a judgment of conviction. *State v. Segermond*, 169.

SALES.

1. **FRAUDULENT PURCHASE OF GOODS ENTITLES THE VENDOR TO RESCIND AND TO RECOVER THE GOODS** as his own by an action of replevin, or to recover their value in an action of trover. *Sleeper v. Davis*, 377.
2. **IF A VENDEE HAS OBTAINED GOODS BY A FRAUDULENT PURCHASE, AND THEN SOLD THEM**, the vendor may waive the tort and maintain *assumpsit* for the proceeds, upon the implied promise to pay for property wrongfully appropriated. *Id.*
3. **WAIVER. — SUIT AGAINST THE VENDEE OF GOODS FRAUDULENTLY PURCHASED TO RECOVER THE VALUE OF A PART OF THEM** which remain in his possession does not affirm the original fraudulent purchase of the whole goods, nor preclude the vendor from recovering the remainder, in an action of replevin against a *mala fide* purchaser from the fraudulent vendee. *Id.*
4. **ACTION OF ASSUMPSIT FOR A PORTION OF GOODS OBTAINED BY A FRAUDULENT PURCHASE** is not a revocation of the rescission of the contract of sale, nor a waiver of the right to sustain an action of replevin against a *mala fide* purchaser from the fraudulent vendee. *Id.*
5. **RELEASE OF AN ANTECEDENT DEBT DOES NOT ENTITLE A VENDEE** to the protection due to a purchaser *bona fide* and for value; and the goods may be recovered from him in an action of replevin by the owner from whom they had been obtained through the medium of a fraudulent purchase. *Id.*

See **CONTRACTS**, 3, 4.

SEARCH-WARRANT.

See **ARREST**, 4; **MALICIOUS PROSECUTION**, 1, 3.

SEDUCTION.

1. **UNDER SECTION 1259 OF THE REVISED STATUTES** of Missouri is a felony, because punishable by imprisonment in the penitentiary; and the fact that it may be punished by a lighter punishment does not rob it of its felonious attributes, nor bring it within section 1705 of such statutes, relating to prosecutions which must be commenced within one year from the time the crime was committed. *State v. Reeves*, 349.

2. **INSTRUCTION THAT SEDUCTION MAY BE FOUND** upon the uncorroborated testimony of the prosecuting witness, but as to the promise of marriage there must be evidence corroborating such witness, and this may be supplied by circumstances proven in evidence, without telling the jury the circumstances which would supply the necessary support to the witness, and without defining what "corroborating" means, is erroneous under sections 1259 and 1912 of the Revised Statutes of Missouri, providing that seduction consists in seducing and debauching any unmarried female of good repute under promise of marriage, and in order to convict, the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury. Such instruction ignores the plain statutory language. *Id.*
3. **DEFENDANT IN SEDUCTION**, who admits that there was illicit intercourse, but no promise of marriage, and his testimony supports such theory, is entitled to an instruction that if the prosecuting witness willingly submitted to defendant, without any promise of marriage, he is entitled to acquittal. *Id.*
4. **INSTRUCTION.** — To constitute seduction under section 1259 of the Revised Statutes of Missouri, the female must be first seduced; that is, corrupted, deceived, and drawn aside from the path of virtue; and second, she must be debauched, that is, carnally known. Therefore an instruction that if defendant promised the prosecuting witness to marry her if she would permit him to have sexual intercourse with her, and she on the faith of such promise did so, etc., he is guilty, is erroneous, for the reason that it does not require that such witness should have been seduced, but simply that she should have been debauched under promise of marriage. *Id.*
5. **EVIDENCE.** — Where prosecution for seduction is not instituted until fifteen months after the birth of a child alleged to be the result of the illicit intercourse, the prosecuting witness may be required to answer at the trial whether the idea of prosecuting the defendant did not spring into existence upon his marriage with another, in order to ascertain her *animus* and the motives which prompted her, after so long a time had elapsed, to institute the prosecution. *Id.*

SET-OFF.

1. **TORT.** — **INDEPENDENT TORT CANNOT BE MADE** a defense against another tort, either by way of set-off or counterclaim. *Kelly v. Goodrich*, 88.
2. **TENNESSEE STATUTORY RIGHT OF SET-OFF** is incidental to and dependent upon the fact of the plaintiff having established a right of recovery against the defendant. If this fails, the right of set-off does not exist. *Moore v. Tate*, 712.
3. **WHEN NOT AVAILABLE AGAINST STATE.** — Immunity from suit possessed by state as a prerogative of its sovereignty applies to a cross-action by set-off, unless otherwise expressly provided by statute. *Id.*
4. **TENNESSEE STATUTE**, Milliken and Ventrees's Code, section 3628, regulating set-off and cross-action, has no application in suits brought by the state in its own courts, and the defendant in such suit cannot avail himself of an independent claim, not growing out of or connected with the subject-matter of the original suit, as a defense or otherwise, and this rule also applies when a sister state is the plaintiff in the suit. *Id.*

See **BANKS AND BANKING**, 7; **OFFICE AND OFFICERS**, 3.

SHIPPING.

REMEDY OF CO-OWNERS OF VESSELS FOR CONTRIBUTIONS FOR ADVANCES. —

One co-owner of a vessel cannot maintain an action at law against the other owners jointly to recover for contributions for advances. The joint remedy exists only in equity, and an assignee of such owner has no greater right than his assignor. *Arey v. Hall*, 232.

See AGENCY, 2.

SOVEREIGNTY.

See STATE, 1, 2.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE OF A CONTRACT RESPECTING PERSONAL PROPERTY** will not ordinarily be enforced in equity unless an adequate remedy at law cannot be had. *Eckstein v. Downing*, 404.
2. **WILL NOT BE DECREED OF CONTRACTS FOR THE SALE OF STOCKS IN PRIVATE CORPORATIONS** where the breach of the contract is capable of exact compensation in damages. Hence specific performance was refused where the plaintiff had agreed to sell a yacht and the defendant to pay therefor a certain number of shares of stock of a designated corporation, there being no evidence tending to show that plaintiff had any wish or reason to become the owner of such stock rather than of any other stock of equal value, or that he would not have agreed to take any other stock of equal value in payment of the yacht, or a sum of money equal to that value. *Id.*
3. **MUTUALITY OF REMEDY. —** The fact that one party to a contract is entitled to have a specific performance of such contract decreed by a court of equity does not entitle the adverse party to a decree of specific performance in his favor if a breach of the contract may be adequately compensated, so far as he is concerned, by the payment of a sum of money. *Id.*

STATE.

1. **SOVEREIGNTY — SUITS BY AND AGAINST STATE. —** Sovereign state may bring and maintain suit as any other suitor, but cannot be sued in its own courts, or in a foreign court, without its consent and permission, signified either by statute or by some other unequivocal means. *Moore v. Tate*, 712.
2. **SOVEREIGNTY — ACTION BY STATE. —** State having voluntarily placed itself in position of suitor, whether in its own courts or in those of a sister state, will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action upon which the suit was brought. *Id.*

See CONSTITUTIONAL LAW, 7; CONTRACTS, 2; SET-OFF, 3, 4.

STATUTES

1. **CONSTRUCTION. —** STATUTE IS NOT TO BE ISOLATED FROM GREAT BODY OF LAW of which it forms a part, but is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes. *Wilson v. Donaldson*, 48.
2. **STATUTES INVOLVING PENAL CONSEQUENCES CANNOT BE EXTENDED** by construction so as to include acts not in terms forbidden merely because

of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious. *Sondheim v. Gilbert*, 23.

SUBROGATION.

1. **RIGHT TO SUBROGATION OR SUBSTITUTION, WHEN IT DOES NOT REST ON EXPRESS COVENANT**, must depend upon equitable principles applicable to the relations which the parties sustain to each other. *Insurance Co. of N. A. v. Fidelity etc. Trust Co.*, 546.
2. **IT IS NOT LIABILITY TO PAY, BUT ACTUAL PAYMENT** to the creditor which raises the equitable right to be subrogated to his remedies. A demand made by the surety for subrogation before he has discharged the liability out of which it grows is without anything to support it, and the creditor may properly refuse it without affecting thereby his right of action against the surety. *Id.*
3. **SUBROGATION IS SUBSTITUTION OF ANOTHER PERSON IN PLACE OF CREDITOR**, so that the person substituted will succeed to all the rights of the creditor having reference to the debt due him. It is independent of any merely contractual relations, and includes every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. *Johnson v. Barrett*, 83.
4. **MORTGAGES—WHERE MORTGAGE IS EXECUTED TO RAISE MONEY TO DISCHARGE PRIOR ENCUMBRANCE**, and the money is so applied, the mortgagee becomes entitled to be subrogated to the rights of the prior encumbrancer when necessary for the better security of his mortgage debt. *Id.*
5. **ONE REQUIRED TO PAY, AND WHO HAS ACCORDINGLY PAID, a mortgage executed by another**, is entitled to be subrogated to the rights of the mortgagee, and to be treated as the assignee of the mortgage, notwithstanding the mortgage itself may have been canceled, and the mortgage debt discharged. *Id.*
6. **SUBROGATION TO RIGHTS OF PRIOR MORTGAGEE.**—A mortgage was executed by husband and wife upon the former's real estate, after which the husband conveyed the same land to the wife, who died shortly after a judgment of foreclosure was rendered, leaving her husband and children surviving her. One J., at the husband's request, and upon his representation that his title was clear and complete, and without actual notice to the contrary, paid the amount of the judgment rendered upon the mortgage, and caused the judgment and decree of foreclosure to be receipted and released, and to be discharged of record, taking a new note and mortgage from the husband for the amount so advanced. *Held*, that upon ascertaining the facts, J. was entitled to have the satisfaction of the judgment set aside and vacated, and that justice required that he be subrogated to all the rights of the prior mortgagee, without regard to the solvency or insolvency of the mortgagor. *Id.*
7. **If the purchaser of an equity of redemption pays a mortgage to which the wife of the mortgagor was a party, or gives a new mortgage in place of such mortgage**, he becomes in an equitable sense the purchaser of the interest of the original mortgagee, and is entitled to be subrogated to the position of the mortgagee, and to stand in equity as the purchaser and holder of his security. *Everson v. McMullen*, 445.

See INSURANCE, 6, 8.

SURETYSHIP.

1. **SURETIES ON NOTE ARE NOT DISCHARGED FROM LIABILITY** where the payee surrenders the note, and accepts in renewal another note, to which the insolvent principal has forged the names of other sureties, no bad faith or negligence on the part of the payee being shown. The fraud of the principal, without participation of the creditor, will not release the sureties. *Bank v. Buchanan*, 617.
2. **CONTRIBUTION. — FOUNDATION OF DOCTRINE OF CONTRIBUTION AMONG SURETIES** is the fact that one has paid more and another less than his share; and a surety who has paid less than his ratable share cannot enforce contribution, even against his co-sureties who have paid nothing. *Gross v. Davis*, 635.
3. **IN SUIT IN EQUITY BY SURETY TO ENFORCE CONTRIBUTION AGAINST HIS CO-SURETIES**, the rate of contribution is determined according to the number of solvent sureties, and not by the whole number of sureties, as in an action at law. *Id.*
4. **IN MAKING CONTRIBUTION AMONG SURETIES, ALL PAYMENTS** made on the joint indebtedness must be added together, and the aggregate divided by the number of solvent sureties, charging each with his share thus ascertained, and crediting him with the amount of his payments. *Id.*
5. **SURETY WHO HAS PAID MORE THAN HIS PART, AND WHO SUES FOR CONTRIBUTION**, IS ENTITLED to a recovery of the excess against each of his co-sureties equally, when there is no contravening equity, provided it subjects none of them to the payment of more than his proper share of the whole joint liability; but a defendant surety in the suit who has paid more than his part can have no recovery in his favor against his co-sureties for the excess, upon answer merely, without cross-bill. *Id.*
6. **ATTORNEYS' FEES AND COSTS AS MATTER FOR CONTRIBUTION. —** Attorneys' fees paid by a surety, which were incurred with the consent of his co-sureties in making a prudent defense for their common benefit are proper matter for contribution, and so are costs adjudged against the sureties jointly in such litigation, and paid by one of them. *Id.*

See BONDS, 2.

TAXATION.

1. **TO PRECLUDE A PERSON FROM ACQUIRING A TAX TITLE**, he must be under some legal or moral obligation to pay the tax, or there must be something in his contract or fiduciary relation to the owner of the property which renders it inequitable, as between them, that he should acquire the title. *Laton v. Balcom*, 381.
2. **HUSBAND OF A MORTGAGEE MAY, BY PURCHASE AT A TAX SALE**, acquire the title of the mortgagor; but is precluded from becoming a purchaser for his own benefit as against his wife. *Id.*

See Co-TENANCY.

TELEGRAPHS.

1. **TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS**; nor are they insurers, either of the accurate transmission or the sure and prompt delivery of messages. They are liable, however, for losses consequent upon their negligence. *Western Union Tel. Co. v. Mumford*, 630.

2. **COMPANY RECEIVING MESSAGE FOR TRANSMISSION OVER ITS OWN LINE, AND WHICH BECOMES** the agent of the sender to forward it over the line of another company, may, by special contract with the sender, limit its liability to defaults occurring upon its own line, and protect itself against any loss occasioned by the negligence of the connecting company. *Id.*
3. **ALTHOUGH ADDRESS OF MESSAGE IS CHANGED THROUGH NEGLIGENCE OF COMPANY** in transmitting it to a connecting line, yet if it appears that the loss occasioned by delay in the delivery of the message was not in consequence of such error, but was the result solely of the subsequent and independent negligence of the connecting company, the former is not liable for the damage sustained. The change of address in such case cannot be regarded as the proximate cause of loss. *Id.*
4. **MERELY TAKING IMPORTANT TELEGRAM TO OFFICE OF PERSON TO WHOM IT IS ADDRESSED** does not end the duty of the messenger, where the latter knew the former and his place of residence, which was near by, and the person addressed was well known in the town. *Western Union Tel. Co. v. Cooper*, 772.
5. **TELEGRAM, "YOU HAD BETTER COME AND ATTEND TO YOUR CLAIM AT ONCE,"** imparts notice of its purpose, and of the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for its transmission. And the duty of carefulness would not have been more fully indicated to the telegraph company by the insertion therein of the name of the debtors of the sender, in the absence of testimony showing otherwise. *Western Union Tel. Co. v. Sheffield*, 790.
6. **CORRESPONDENCE BETWEEN TELEGRAPHIC OPERATORS SENDING AND RECEIVING MESSAGE** not communicated to the sender is not admissible in evidence for the purpose of showing that the person to whom the message was sent was not at the time in the place to which it was sent. *Western Union Tel. Co. v. Cooper*, 772.
7. **INFORMATION GIVEN AT OFFICE OF PERSON TO WHOM TELEGRAM IS ADDRESSED** to the messenger sent there to deliver it, touching the whereabouts of such person, is admissible in evidence upon the issue of negligence or not on the part of the operator and messenger in failing to deliver the message. *Id.*
8. **REASONABLE DILIGENCE MUST BE USED TO DELIVER TELEGRAM**, and what will constitute such diligence in a particular case will depend upon the circumstances of that case, of which the jury are the exclusive judges. *Id.*
9. **WHERE PETITION ALLEGES THAT TELEGRAM WAS PROMPTLY TRANSMITTED FROM OFFICE** at which it was received, but there is evidence that it was delayed there for a time, the court should charge the jury that they should confine their inquiry to the question of proper care or negligence in delivering the message at the office of delivery. *Id.*
10. **NEGLIGENT TRANSMISSION OF MESSAGE—MEASURE OF DAMAGES.**—A telegram which is expressed in abbreviations known to the transmitting company is in no sense "in cipher"; and if such abbreviated telegram be altered through the negligence of the company, the sender will be entitled to recover such damages as result naturally and proximately from the company's default, and which he could not himself avert, acting in good faith, and in the exercise of ordinary prudence. And the burden of proof is upon the negligent company to show that the loss might have

been mitigated by a different course of conduct which a reasonably prudent man ought to have taken. *Pepper v. Telegraph Company*, 699.

11. **MERE FACT OF EMPLOYMENT OF TELEGRAPH COMPANY TO TRANSMIT MESSAGE** does not make the company the agent of the sender so as to bind him upon a telegram negligently altered in the transmission. The sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent. *Id.*
12. **COMPANY CANNOT, BY ANY CONTRACT NOT FAIR, just, and reasonable, if at all, limit its liability for damages caused by its negligence in the transmission of messages.** *Id.*
13. **SALE DEFEATED BY NEGLIGENT ALTERATION OF MESSAGE — BASIS OF LIABILITY.** — Where a sale is effected by telegram, and the goods are delivered, but it is afterwards discovered that the sale is invalid owing to the negligent alteration by the telegraph company of the seller's message reducing the price, the true measure of damages is the difference between the real value of the goods and the price which the seller, in the exercise of due care and diligence, should, under the circumstances of the particular case, have received. But the difference between the prices named in the telegram as sent and as received may be taken as the correct measure of damages, in the absence of proof showing any better or more equitable basis of the company's liability. *Id.*
14. **INJURY TO FEELINGS, CAUSED BY FAILURE TO DELIVER TELEGRAPHIC MESSAGE** relating to domestic affairs, is an element of actual damages, where the failure is the result of negligence on the part of the company or its servants. *Western Union Tel. Co. v. Cooper*, 772.
15. **DAMAGES MAY BE RECOVERED COMMENSURATE WITH INJURY**, without reference to the degree of negligence causing it, if the inexcusable negligence of a telegraph company's servants is found to be the proximate cause of the injury. *Id.*
16. **MEASURE OF DAMAGES FOR FAILURE TO DELIVER TELEGRAM**, by reason of which a creditor loses his debt, is the value of such debt at the time, with interest thereon at eight per cent until the day of trial, together with the cost of the message. *Western Union Tel. Co. v. Sheffield*, 790.
17. **IT IS PROPER FOR COURT TO DISTINGUISH BETWEEN SUFFERING ACTUALLY ENDURED** and the suffering necessarily incident to confinement, and not resulting from the want of medical attendance, in an action to recover for injuries to a wife from failure of a telegraph company to deliver a message sent to her physician. *Western Union Tel. Co. v. Cooper*, 772.

TELEPHONES.

1. **TELEPHONE, AS THE WORD IS USED IN THE STATUTES OF INDIANA**, means an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages. *Central Union Tel. Co. v. Falley*, 114.
2. **TELEPHONE COMPANIES ARE COMMON CARRIERS OF NEWS, AND AS SUCH SUBJECT TO PROPER REGULATIONS** requiring them to conduct their business in a manner conducive to the public benefit. *Id.*
3. **COMPANY MAY BE COMPELLED BY MANDAMUS** to furnish any person or company the like service which it furnishes to others, and on like terms. *Id.*
4. **THE PRICE TO BE CHARGED FOR THE USE OF TELEPHONES AND TELEPHONIC CONNECTIONS** may be regulated by the legislature relative to business conducted within the state. *Id.*

5. COMPANIES MUST FURNISH EACH PERSON, under the statutes of Indiana, with a telephone and with telephonic communications and connections; and cannot relieve themselves from their liability so to do by abandoning what is known as the exchange and rental system, and substituting therefor another system, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon the payment of a certain toll. *Id.*
6. FACT THAT A COMPANY HAS EXTENDED ITS LINES THROUGH DIFFERENT STATES, and is engaged in interstate commerce, will not relieve it from the operation of state statutes, upon business conducted wholly within the state, nor justify its refusal of a telephone and the best telephonic connections and facilities to a person doing business in such state, on the terms prescribed by such statute. *Id.*
7. THE RIGHT TO A WRIT OF MANDATE TO COMPEL THE FURNISHING OF TELEPHONIC FACILITIES IS NOT TAKEN AWAY by a statute imposing a penalty for refusing such facilities. The statutory remedy is cumulative merely. *Id.*
8. EVIDENCE. — When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible. *Wolfe v. Missouri Pacific R'y Co.*, 331.

TORTS.

See DAMAGES, 6; SET OFF, 1.

TRADE-MARKS.

1. WHERE IT APPEARS THAT TRADE-MARK WAS USED TO SECURE BENEFIT TO USER at the expense of the owner, and that it was not simply used in good faith for the purpose of explanation or information, the just presumption is, that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose, and the courts will restrain such wrongful use. *Keller v. Goodrich*, 88.
2. WHERE SIMILITUDE IS IN SUBSTANTIAL PARTS OF TRADE-MARK, THERE IS INFRINGEMENT, and an evasive attempt to hide the similarity, or a colorable explanation which appears to be made for the purpose of escaping the effect of a wrongful use of the trade mark, will not defeat the owner's right to an injunction. *Id.*
3. TRADE-MARK CONTAINING WORDS, "THE AKRON DENTAL RUBBER," IS INFRINGED by the use of a label containing the words, "Non-secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber," the last three words being prominently displayed in large type, and printed in different colored ink from the preceding words, and injunction will lie to restrain the infringement. *Id.*
4. IN CONTENTION AS TO INFRINGEMENT OF TRADE-MARK, EVIDENCE AS TO QUALITY of the articles manufactured by the respective parties is immaterial. *Id.*

TRESPASS.

1. ONE WHO PROCURES A TRESPASS TO BE COMMITTED is liable with those who commit it. *McCloskey v. Powell*, 512.

2. UNDER PENNSYLVANIA STATUTE, act of March 29, 1824, giving treble damages for all timber cut and removed from the land of another without the owner's consent, a person who sells the right to cut timber upon land which he claims, but which in fact belongs to another, and who points out the lines, puts his vendee in possession, and receives the consideration, incurs, with his licensee, the penalty of the statute for all timber cut and removed by such licensee without the consent of the owner. *Id.*
3. TRESPASSER ON THE PREMISES OF ANOTHER ORDINARILY ASSUMES ALL RISK OF DANGER from the condition of the premises, and cannot recover from injury happening to him, without showing that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Frost v. Eastern R. R.*, 396.
4. LAND-OWNER IS NOT LIABLE TO A MINOR WHO, WHILE TRESPASSING UPON THE OWNER'S PREMISES, is injured by a turn-table insecurely guarded and wrongfully set in motion by older boys who are turning and playing thereon, when the premises on which the turn-table was situated is about sixty feet from any public highway, and on land which is inclosed by a fence, and when the turn-table was fastened by a toggle which prevented its being set in motion unless the toggle was drawn by a lever, and the lever could not have been drawn and the turn-table unfastened except by the act of such older boys, or of some person other than such minor. *Id.*
5. TENANT FOR LIFE OF PERSONAL PROPERTY IN POSSESSION has right to reclaim it when it is taken by a trespasser, and the remaindermen need not be joined as parties in an action for its recovery. *Millikin v. Smoot*, 813.
6. DIFFERENT SUITS MAY BE BROUGHT FOR TWO DISTINCT TRESPASSES. Where, therefore, a sheriff wrongfully seizes four horses from the plow and wagon of the owner, which are immediately reclaimed by the owner, and at a different time and place seizes stock-horses of the same owner on the range, the right of action for the recovery of the stock-horses is not lost by the action to reclaim the work-horses. *Id.*

TRIAL.

1. TRIAL COURT MAY PROPERLY REFUSE LEAVE to plaintiff, after the evidence in the case has been all introduced, to file an amended complaint involving an entire change in the theory of the case. *Lewark v. Carter*, 40.
2. SECOND CONTINUANCE IS PROPERLY REFUSED TO RAILROAD COMPANY applying therefor on account of the absence of a witness in its employ residing in another county, where, relying upon being able to have him personally present at the trial, it made no effort to take his deposition, but was disappointed by reason of the fact that one of its officials had given him leave of absence. *East Line etc. R. R. Co. v. Scott*, 804.
3. DISQUALIFIED JUDGE. — By the common law of this state, a judge related to either party within the fourth degree is not qualified to sit in the case. *Fowler v. Brooks*, 425.

TROVER.

MEASURE OF DAMAGES IN ACTION OF TROVER TO RECOVER FOR TREES CARELESSLY, but not willfully, cut on plaintiff's land is the value of such

trees at the place where and immediately after they were severed. Nothing can be added for increased value given to them by subsequent acts of the defendant, such as trimming them and hauling them to his mill. *Beede v. Lamprey*, 426.

TRUSTS AND TRUSTEES.

1. INJUNCTION WILL NOT ISSUE TO PREVENT A SALE UNDER A TRUST DEED GIVEN TO SECURE THE PAYMENT OF A DEBT on the ground that great financial depression exists, and the property, therefore, will not bring anything near its true value. *Muller v. Stone*, 889.
2. DUTY OF TRUSTEE REQUIRES HIM TO USE EVERY REASONABLE EFFORT TO SELL THE ESTATE to the best advantage, and to apply to a court of equity where there is a cloud upon the title or doubt of or uncertainty as to the amount to be raised or as to prior encumbrances, or where there is a conflict between the creditors, and in every case in which the aid of such court is necessary to remove impediments in the way of a fair execution of the trust. *Id.*
3. TRUSTEE WILL BE RESTRAINED FROM MAKING A SALE while there is a cloud upon the title, or doubt or uncertainty as to debts secured, or a dispute or conflict among creditors as to their respective claims. *Id.*
4. SALE BY TRUSTEE WILL NOT BE ENJOINED TO TAKE AN ACCOUNT OF LIENS ON THE PROPERTY, when the exact amount of the debts and other priorities are already fully known. *Id.*
5. RECONVEYANCE OF TRUST ESTATE SUSTAINED. — A single woman, just prior to her marriage in 1846, made a deed of trust of all her property to a trustee, for her sole and separate use, without power in her to alien or encumber, but with a power to dispose of by will. In 1849, upon a bill or petition by the trustee, and a concurring answer signed by the *cestui que trust* and her husband, the court decreed a reconveyance to the *cestui que trust* of the entire property and estate, and a deed of reconveyance was accordingly executed and delivered. In 1887, after the death of the husband, the widow and former *cestui que trust* appealed from the decree made in 1849, alleging that she had no power to consent to it, being a married woman, and that the same was erroneous. In such case, the appellant having reaped the full benefit and advantage of the decree, made upon her own request, and continued to do so for an uninterrupted period of thirty-eight years, and moreover, as the death of her husband effected the same result as the decree, no judgment that the appellate court could render would re-establish the deed of trust, and re-clothe her with the fettered estate which she held under its operation, the decree should not be reversed, even if erroneous. *Bigham's Appeal*, 522.
6. RESULTING TRUST MUST ARISE AT THE TIME OF THE EXECUTION OF THE CONVEYANCE. A subsequent payment will not, by relation, attach as a trust the original purchase. *Beecher v. Wilson*, 883.

See WILLS, 16-18.

UNDUE INFLUENCE.

See GIFTS, 3.

USAGES.

USAGE IS NOT ADMISSIBLE TO CONTROL THE RULES OF LAW or to contradict the express or implied terms of a contract, or to make the rights or

liabilities of the parties other than they are by the common law.
Mutual Assur. Soc. v. Scottish etc. Ins. Co., 819.

See BANKS AND BANKING, 6; INSURANCE, 3.

VERDICT.

See DAMAGES, 7.

WAGERS.

See NEGOTIABLE INSTRUMENTS, 3, 5.

WAREHOUSEMEN.

See CARRIERS, 19.

WILLS.

1. FUNDAMENTAL RULE IN CONSTRUCTION OF WILLS IS, that the intention of the testator, if not inconsistent with some established rule of law, must control; and to ascertain that intention the courts will look to the circumstances under which he makes his will, as to the state of his property and his family. *Elliott v. Elliott*, 54.
2. ORDINARILY, NO TRUST WILL ARISE where a devise is made to one standing in the relation of parent, as such directions generally relate to the motive only of the testator or donor. *Id.*
3. CONSTRUCTION OF WORDS "MY CHILDREN," IN DEVISE. — Devise of property to wife "to use and dispose of as she may think best for herself and my children," bequeaths the property to the wife, charged with an implied trust for the use of herself and the testator's children. And the words "my children" will be construed to mean the testator's illegitimate children by the devisee, to the exclusion of his legitimate children by a former wife, where it is plain from the surrounding circumstances that such was his intention. *Id.*
4. COMPULSION OF DEVISEE TO PERFORM PROMISE. — Where a husband expressed to his wife his intention of devising all his property to his own heirs, but was induced by her to sell and will it to her, in form absolute, upon her assurances that she would use it during her natural life, and at her death would devise it to his heirs, upon the failure or refusal of the devisee to perform her agreement after the death of the testator, equity will decree a trust in favor of such heirs, and convert the devisee into a trustee for their benefit. *Gilpatrick v. Glidden*, 245.
5. PRECATORY BEQUEST. — A will proved prior to the Pennsylvania wills act of 1833 contained an introductory paragraph, which provided: "And to such worldly estate wherewith it hath pleased God to intrust me, I dispose of the same in the following manner." In a subsequent clause was a devise as follows: "I will and bequeath to my daughter, Mary McIntyre, the one half of the land that I possess above the road, that is, the north end. She will not have power to sell, but may leave the same to her children." In such case, the first sentence of this clause, construed in connection with the introductory paragraph, passes a fee, unaffected by the attempted restraint upon alienation contained in the second sentence of said clause; and the additional words of the second sentence, "but may leave the same to her children," are precatory only, and not obligatory, and so cannot defeat the otherwise operative effect of the devise. *McIntyre v. McIntyre*, 529.

6. **OLOGRAPHIC WILL. — UNSIGNED CLAUSE OF ATTESTATION** following the signature to an olographic will does not create any presumption that the testator did not intend it to have effect as his will. The will was complete when signed, and even if the clause of attestation was added with the intent of revoking the will, it cannot be permitted to have that effect, for the reason that the revocation of a will must be executed with the same formalities as the will itself. *Perkins v. Jones*, 863.
7. **CODICIL TO OLOGRAPHIC WILL. — A PAPER FOUND INCLOSED IN AN OLOGRAPHIC WILL**, and executed with all the formalities requisite for a will, and testamentary in its character, must be admitted to probate as a codicil to the first will, though it contains no reference thereto. *Id.*
8. **TESTAMENTARY PAPER WHICH DOES NOT MEET REQUIREMENTS** of Pennsylvania wills act of 1833 is not a will, and the register cannot make it one by admitting it to probate. *Wall v. Wall*, 549.
9. **INVALIDITY OF DECREE ADMITTING WILL TO PROBATE. —** When the record of probate shows that the testamentary writing presented to the register for probate was not signed by the alleged testator, and that the failure to sign was not accounted for, as required by the Pennsylvania wills act of 1833, in order to entitle the writing to probate, in such case, the register was without jurisdiction, and his decree admitting the paper to probate as a will was an absolute nullity. *Id.*
10. **PERPETUITIES. —** Where a testator bequeaths an equal share of the income of a trust fund to each of his four children for life, and upon the death of either or each, then one fourth of the residuary estate to go to the use of his or her child or children who attains the age of twenty-five years, and the issue of any or of such as should die under that age leaving issue, in equal shares, but if more than one, such issue to take their parents' share *per stirpes*, and if any of the testator's children should die without issue surviving, then the share so limited to his or her child or children to go to the other children and their issue upon the limitations above set forth, and then by codicil directs that distribution shall be made *per capita* among the grandchildren instead of *per stirpes*, and no grandchildren are born after his death, — such bequests to the grandchildren are contingent, and vest only when he or she shall have attained the age of twenty-five years; and as those born before and after the testator's death are included, and as under the will the vesting of the remainders may be postponed for more than twenty-one years after the death of a life tenant, the rule against perpetuities is violated, and remainder void. *Coggin's Appeal*, 565.
11. **LEGACY, VESTED OR CONTINGENT. —** Where there is any serious doubt whether a legacy is vested or contingent, the doubt should be resolved in favor of vesting, if such conclusion can be reached by a fair and reasonable construction of the whole will, and not from particular expressions. *Id.*
12. **PERPETUITIES. —** Rule that future interests must vest within a life or lives in being, and twenty-one years thereafter, must be tested by possible, and not by actual, events, and if the gift is to a class, and is void as to any of the class, it is void as to all. *Id.*
13. **WHERE PARTICULAR ESTATE OR INTEREST FOR LIFE** is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution. *Id.*

14. **PERPETUITIES.** — Future estates limited upon a life estate, which will not certainly take effect within twenty-one years, and the usual period of gestation thereafter, and after the termination of the life estate, are void as against perpetuities. *Id.*
15. **CONTINGENT REMAINDER.** — Where the attainment of a certain age forms part of the original description of the devisee, the vesting of the estate is suspended until the attainment of that age, even though the limitation over is only to take effect in case of his death under that age without issue. *Id.*
16. **MANDATORY TRUST.** — Where a testator creates a trust in his residuary estate by providing that "I give and bequeath the same to my executors, to be devoted and given by them to such institutions or uses as they in their best judgment may consider the most compatible with the views and instructions which I have given them," and expressly providing that no part of such estate should pass under the intestate laws, such trust is mandatory, and gives the executors a discretion in carrying out the orders and instructions of the testator according to his judgment, and not a discretion to distribute the estate according to their judgment. *McCurdy's Appeal*, 575.
17. **EXHAUSTED TRUST.** — Where the testimony of the executors, one of whom is dead, is the only evidence of the object of a trust, and they, by solemn instrument under seal, against their interests, declare that they have fully carried out or provided for all the objects of the testator's bounty, as expressed by him in his secret instructions to them, further inquiry as to unexecuted instructions will not be required. *Id.*
18. **EXHAUSTED TRUST — DISTRIBUTION OF BALANCE.** — Where a trust by a testator is established, but its terms are not stated in the will, the only evidence of its objects being the testimony of the executors, and they, by solemn instrument, under seal, declare that they have fully carried out or provided for all the objects of the testator's bounty, as expressed by him in secret instructions to them, and that there is an unappropriated balance which they claim as their own; the purposes of the trust being exhausted, such balance must be distributed under the intestate laws, though that be contrary to the testator's express desires. *Id.*
19. **POWER OF SALE.** — Although the time for the exercise of a power of sale contained in a will may not be limited by any words used in its creation, still the intention of the testator as to the time of its exercise may be ascertained from the terms of the entire will and its manifest general scheme and purpose. *Wilkinson v. Buist*, 580.
20. **POWER OF SALE.** — Where a power of sale to executors contained in a will is, when taken alone, without limitation as to time for its exercise, but is exercisable, in their discretion, at any time after the testator's death, and yet it appears from an interpretation of the entire will that it was the intention of the testator to limit the time for its exercise to the lifetime of his widow, its exercise after her death by the executors will create a defective title. *Id.*
21. **POWER OF SALE** contained in a will, though expressed in the most general terms as to the time for its exercise, cannot be further exercised, if the purpose for its creation appears, and that purpose has ceased, as it will not be presumed that the testator intended that it should be exercised after the accomplishment of its purpose. *Id.*

22. DURATION OF POWER OF SALE in a will as to the time for its exercise is governed by the intention of the testator in all cases; and when the limitations in a settlement by will have expired, and absolute interests in fee have vested in possession in persons *sui juris*, it may well be supposed that the testator intended that a power of sale, without limitation of time for its exercise, will not thereafter be exercised; but if a contrary intent appears from the will, the power will be upheld, unless obnoxious to the rule against perpetuities, or the *cestui que trust* has elected to take the property as it stands. *Id.*
23. A LEGACY OR DEVISE LAPSES AND BECOMES VOID by the rules of the common law, if the legatee or devisee fails to survive the testator. *In the Matter of Wells*, 457.
24. A TESTATOR IS NEVER SUPPOSED TO INTEND TO GIVE TO ANY BUT THOSE WHO MAY SURVIVE HIM, unless he expresses such intention in unmistakable language. *Id.*
25. INTENTION THAT A LEGACY SHALL NOT LAPSE is not manifest from the fact that the testator, after making the legacy and naming the legatee, adds these words: "To have and to hold the same to them, their heirs and assigns forever." This rule remains applicable in the state of New York, notwithstanding the provisions of its statutes, under which words of inheritance are no longer necessary to convey a fee, and are mere surplusage when used in wills or in deeds. *Id.*
26. EXTRINSIC EVIDENCE IS ADMISSIBLE TO AID IN THE EXPOSITION OF A WILL only in those cases where from some ambiguity or obscurity a difficulty arises in applying the words of the will to the subject-matter of a devise or legacy. *Id.*
27. EVIDENCE THAT THE LEGATEES WERE THE NEXT OF KIN of the deceased husband of the testatrix, from whom she had received all her estate, is not sufficient to give the words any other than their ordinary signification, nor to prevent the lapse of any of such legacies upon the death of the testatrix prior to that of the legatee. *Id.*
28. IF THE ENJOYMENT OF A LEGACY IS POSTPONED, THE LEADING INQUIRY for the purpose of determining whether it vests or not is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like. *Goebel v. Wolf*, 464.
29. LEGACY, WHEN IT DOES NOT VEST. — If the only gift consists of a trust to divide at a future time, the gift is future, not immediate, contingent, nor vested, unless from the particular circumstances a contrary intention may be collected. *Id.*
30. IN CONSTRUING A WILL, THE CONSTRUCTION SHOULD FOLLOW THE INTENT collected from the whole will; and the general rules adopted by the courts to aid the interpretation of wills must give way when, on a consideration of the scheme of the will, or of special clauses or provisions, their application in a particular case would defeat the intention. *Id.*
31. A DEVISE OR BEQUEST WILL BE REGARDED AS VESTED, AND NOT CONTINGENT, if the property is devised to trustees to be by them divided among the children of the testator on the youngest attaining the age of twenty-one years, when it appeared there was reason for postponing their enjoyment until that time, and the income is directed by the testator to be invested "for the benefit of his children," and the trustees are directed "to invest the same for the benefit of my said children,"

and also "to pay and advance to each of my children as they respectively arrive at the age of twenty-one years, or as they shall respectively marry, the sum of three thousand dollars," and also directs that the *corpus* and accumulations shall be "divided equally among my children, share and share alike, after deducting all advances made as above provided to any of my children, so that each child may have and receive an equal share of my estate." Upon death of one of the children before the period of division arrives, his share vests in his heirs at law. *Id.*

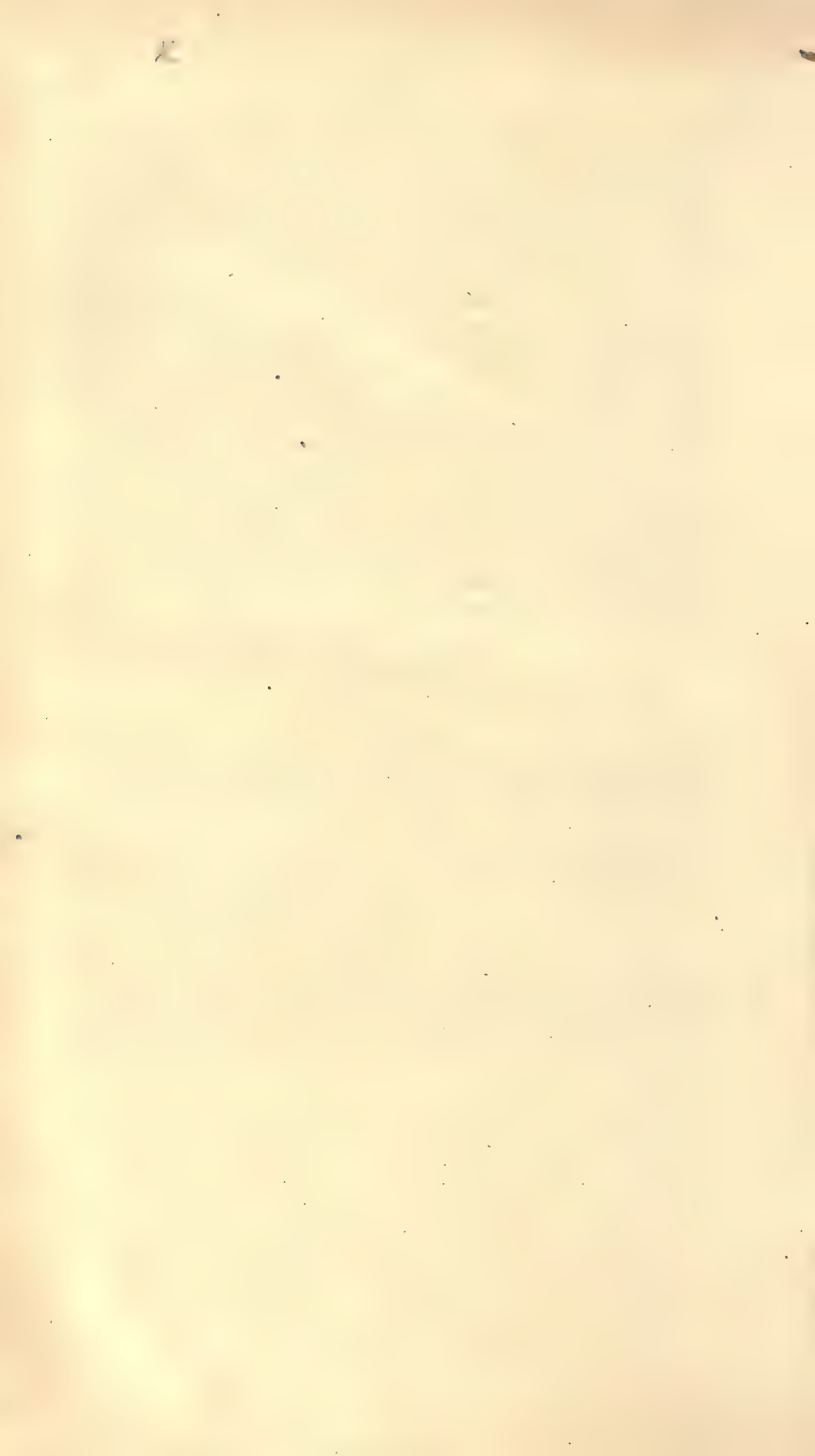
32. REVOCATION BY CODICIL. — When a testator, by a codicil, revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being conditional, and dependent on a contingency which fails. This rule applies to cases where the falsity or error of the alleged fact rested, not in the personal knowledge of the testator, but was assumed upon information derived from others. *Mendinhall's Appeal*, 590.
33. REVOCATION BY CODICIL. — Where a testator revokes a bequest to his daughter by a codicil, giving as a reason therefor that he had, since the execution of his will, made a gift and loan to her husband, such codicil will not be set aside on the ground that the transaction was a sale, and not a gift, and that no loan was made, when the facts were peculiarly within the knowledge of the testator, and the transaction was in effect an advancement, and so regarded by him. *Id.*

See EXECUTIONS, 9.

WITNESSES.

1. IMPEACHMENT. — Credit of witness may be impeached by showing, after laying the proper foundation, that he has made statements out of court inconsistent with those made in court. *Leahey v. Cass Ave. etc. R'y Co.*, 300.
2. RULE OF PROCEDURE IN CASE OF CONTEMPT. — Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness. *Keller v. Goodrich*, 88.
3. ASSISTANCE OF COURTS IN SECURING TESTIMONY. — ON PRINCIPLE OF COMITY, courts of state where a deposition is taken to be used in another state will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions. *Id.*





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